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**The Impact
of the European Convention on Human Rights
on Domestic Scandinavian Law**

A Case-Law Study

by

Søren Stenderup Jensen

Thesis submitted for the doctorate at the European University Institute.

Members of the Examining Board:

Professor *Antonio Cassese*, EUI (Supervisor)
Justice *Hans Danelius*, Högsta Domstolen, Stockholm
Professor *Luis Díez-Picazo*, EUI
President of the Court of Justice, *Ole Due*, Luxembourg
Professor *Carl Aage Nørgaard*, University of Århus

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Preface

The present thesis is the final result of my studies at the Ph.D.-program at the European University Institute.

While carrying out the studies at the Institute I was granted leave from my normal work in the Danish Ministry of Justice. Additional financial support from *Gangstedfonden*, *Axel H's Rejselegat*, *UniDanmark*, *Gavefonden*, *Knud Højgaards Fond*, the *Danish Research Academy* and *Henry Shaw's Legat* enabled me to finish the studies. I wish to express my gratitude for this assistance.

Throughout the work on the thesis I have had invaluable help from a number of persons. I wish in particular to acknowledge the help from my supervisor, Professor *Antonio Cassese*, who constantly and patiently tried to adapt himself to Scandinavian legal thinking, as well as encouraging me when necessary. Head of Division in the Danish Directorate of Civil Aviation *Hans Dahl* has been so kind to read the manuscript and comment upon it. Professors *Henrik Zahle* and *Isi Foighel* has contributed with ideas and advices on the delimitation of the study. Mr *Fredrik G.E. Sundberg* has provided me with Swedish material as well as material from the European Court of Human Rights. My friends and colleagues Mr *Bertil Frosell*, Ms *Michala Elisabeth Høg*, Mr *Bo Friborg Kristiansen* and Mr *Torben Sørensen* supplied me with (lots of) Danish material and were always willing to discuss the study with me or read and comment on previous drafts of parts of it. Finally, Ms *Nicola Owtram* and Mr *Stephen Hopkins* carried out the very difficult task of revising the English language in the manuscript.

I am grateful and indebted for the help I have received in this way. The responsibility for any errors or mistakes remains, however, exclusively mine.

Parts of the study have been published under the title "*Folkeretten som retskilde i dansk ret*", [International Law as a Source of Law in Danish Law] in UfR 1990 B, pp. 1 ff.

Chapter 13 is based on a specific study: "*The European Convention on Human Rights in Domestic Law: A Comparative Study of the Convention's Status in Denmark and Spain*", carried out in collaboration with lecturer *Angel Rodríguez-Vergara Díaz*, University of Malaga.

Studies written in English, but referring to non-English speaking countries, face serious difficulties with translations. This applies in particular to this study where a large number of translations are made without

professional linguistic assistance. Where it has been possible, English translations are taken from official or semi-official documents and otherwise from legal writings. However, the majority of translations have been made by the author. In order not to lose nuances in these translations, the quotation in the original language is left in a footnote in []. These footnotes do not form part of the system in the footnote-apparatus.

Florence, March 1991
Søren Stenderup Jensen

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List of Abbreviations

All E.R.: The All England Law Reports.

Almering (1973): Rolf Almering: *Europakonventionen som lagfortolkningsfaktor*, [The European Convention as a Means of Interpretation], SvJT 1973, pp. 774 ff.

Andenæs (1986): Johs. Andenæs: *Statsforfatningen i Norge*, [The Constitution in Norway], 6th edition, Oslo (1986).

Bernhard & Lehmann (1985): John Bernhard & Tyge Lehmann: *Den europæiske Menneskerettighedskonvention*, [The European Convention of Human Rights], Copenhagen (1985).

Betænkning: Betænkning om..., [Official Report Series of Danish Legislative and Investigation Commissions].

Betænkning 682/1973: Betænkning nr. 682/1973 om Kundgørelse og opfyldelse af traktater, [Report No. 682/1973 on the Proclamation and Fulfilment of Treaties].

Blaustein & Flanz: Albert P. Blaustein & Gisbert H. Flanz: Constitutions of the Countries of the World, New York.

BOE: Boletín Oficial del Estado, [The Official Gazette in Spain].

Brunfelter (1986): Ulf Brunfelter: *Egendomsskyddet, grundlagen och europakonventionen*, [The Right of Property, The Constitution and the European Convention], Stockholm (1986).

Collection: European Commission of Human Rights: Collection of Decisions, Strasbourg.

Danelius (1984): Hans Danelius: *Mänskliga rättigheter*, [Human Rights], 3rd edition, Stockholm (1984).

Danelius (1989): Hans Danelius: *Mänskliga rättigheter*, [Human Rights], 4th edition, Lund (1989).

D.R.: European Commission of Human Rights: *Decisions and Reports*, Strasbourg.

Drzemczewski (1983): Andrew Drzemczewski: *European Human Rights Convention in Domestic Law*, Oxford (1983).

Eckhoff (1987): Torstein Eckhoff: *Rettskildelære*, [The Doctrine of the Sources of Law], 2nd edition, Oslo (1987).

Eilschou Holm (1981): Niels Eilschou Holm: *Konventionens praktiske betydning i Danmark*, [The Practical Significance of the Convention in Denmark], NTfR 1981, pp. 118 ff.

Eilschou Holm (1986): Niels Eilschou Holm: *The Danish Ombudsman and the European Convention of Human Rights*, 30 Sc.St.L., (1986), pp. 77 ff.

Espersen (1968): Ole Espersen: *Indgåelse og opfyldelse af traktater i Sverige*, [Conclusion and Fulfilment of Treaties in Sweden], TfR 1968, pp. 257 ff.

Espersen (1970): Ole Espersen: *Indgåelse og opfyldelse af traktater*, [Conclusion and Fulfilment of Treaties], Copenhagen (1970).

EuGRZ: *Europäische Grundrechte Zeitschrift*.

The European Commission: *The European Commission of Human Rights*.

The European Court: *The European Court of Human Rights*.

Fawcett (1987): J.E.S. Fawcett: *The Application of the European Convention on Human Rights*, 2nd edition, Oxford (1987).

Fleischer (1984): Carl August Fleischer: *Folkerett*, [Public International Law], 5th edition, Oslo (1984).

FT/RT: *Folketingstidende (1953-)/Rigsdagstidende (-1953)*, [The Official Report of Parliamentary Proceedings in Denmark].

Germer (1988): Peter Germer: *Statsforfatningsret*, [Constitutional Law], Vol. 1-2, Copenhagen (1988-89).

Gulmann (1983): Claus Gulmann: *The Position of International Law within*

the Danish Legal Order, NTfIR 1983.

Gulmann (1987): Claus Gulmann: *Denmark* in Jacobs & Roberts (1987), pp. 36 ff.

Gulmann (1988): Claus Gulmann: *Den europæiske Menneskerettigheds-konvention som bestanddel af dansk ret?*, [The European Convention of Human Rights as Part of Danish Law?], *Juristen* 1988, pp. 285 ff.

Gulmann, Bernhard & Lehmann (1989): Claus Gulmann, John Bernhard & Tyge Lehmann: *Folkeret*, [Public International Law], Copenhagen (1989).

Helgesen (1982): Jan Erik Helgesen: *Teorier om "Folkerettens stilling i norsk rett"*, [Theories on "the Position of International Law in Domestic Norwegian law"], Oslo (1982).

Holst-Christensen (1989): Nina Holst-Christensen: *Gælder Menneskerettighederne i Danmark?*, [Do the Human Rights Apply in Denmark?], *Juristen* 1989, pp. 48 ff.

IYIL: Italian Yearbook of International Law.

Jacobs (1975): Francis G. Jacobs: *The European Convention on Human Rights*, Oxford (1975).

Jacobs & Roberts (1987): Francis G. Jacobs & Shelley Roberts (eds.): *The Effect of Treaties in Domestic Law*, London (1987).

Madsen (1986): Niels Madsen: *Domstolenes anvendelse af folkeret og EF-ret*, [The Courts' Application of International Law and EC-Law], Sænummer af UfR i anledning af Højesterets 325 års jubilæum, Copenhagen (1986), pp. 33 ff.

Mamlöf & Mellqvist (1982): Bertil Mamlöf & Mikael Mellqvist: *Om statens skadeståndsansvar vid myndighetsutövning*, [On the State's Liability for Damages Emerging from the Exercise of Authority] in Jakob W.F. Sundberg (ed.): *Studier kring Europakonventionen*, Stockholm (1982)

Matscher & Petzold (1988): Franz Matscher & Herbert Petzold: *Protecting Human Rights: The European Dimension*, Studies in honour of Gérard J. Wiarda, Köln (1988).

Melander (1984): Göran Melander: *The Effect of Treaty Provisions in Swedish Law*, NTfIR 1984, pp. 62 ff.

Mikkelsen (1989): Niels Mikkelsen (ed.): *The Implementation in National Law of the European Convention on Human Rights*, Proceedings of *The Fourth Copenhagen Conference on Human Rights*, 28 and 29 October 1988, Copenhagen (1989).

The Ministry of Justice: The Danish Ministry of Justice: *Redegørelse for visse statsretlige spørgsmål i forbindelse med dansk tiltrædelse af de europæiske fællesskaber*, [Report on Constitutional Problems Raised by Accession to the EEC], NTfIR 1971, pp. 65 ff.

NJA: *Nytt Juridisk Arkiv*, [Swedish Supreme Court Reports].

NJoIL/NTfIR: *Nordic Journal of International Law/Nordisk Tidsskrift for International Ret*.

NOU: *Norges offentlige utredninger*, [Official Reports Series of Norwegian Legislative and Investigation Commissions].

NOU 1972:16: *NOU 1972:16. Gjennomføring av lovkonvensjoner i norsk rett*, [The Implementation of Treaties in Norwegian Law].

NRt.: *Norsk Retts Tidende*, [Norwegian Law Reports].

Opsahl (1979): Torkel Opsahl: *Human Rights Today: International Obligations and National Implementation*, 23 Sc.St.L. (1979), pp. 149 ff.

Rehof & Gulmann (1989): Lars Adam Rehof & Claus Gulmann (eds.): *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries*, Alphen aan den Rijn (1989).

Rehof & Trier (1990): Lars Adam Rehof & Tyge Trier: *Menneskeret*, [Human Law], Copenhagen (1990).

Ross (1958): Alf Ross: *On Law and Justice*, London (1958).

Ross (1980): Alf Ross: *Dansk statsforfatningsret*, [Danish Constitutional Law], Vol. 1-2, 3rd edition by Ole Espersen, Copenhagen (1980).

Ross, Andersen, Lehmann & Magid (1984): Alf Ross, Ole Stig Andersen, Tyge Lehmann & Per Magid: *Lærebog i Folkeret*, [Textbook in Public International Law], 6th edition, Copenhagen (1984).

RÅ: Regeringsrättens Årsbok, [Swedish Supreme Administrative Court Reports].

Sc.St.L.: Scandinavian Studies in Law.

Smith (1962): Carsten Smith: *Den internasjonale rettens innvirkning på den nasjonale retten*, [The Impact of International Law on Domestic Law], TtR 1962, pp. 182 ff.

Smith (1964): Carsten Smith: *Folkerettens stilling ved norske domstoler*, [The Position of International Law in Norwegian Courts], TtR 1964, pp. 356 ff.

Smith (1968): Carsten Smith: *International Law in Norwegian Courts*, 12 Sc.St.L. (1968), pp. 153 ff.

Smith (1980): Carsten Smith: *Om internasjonale menneskerettigheter og nasjonale domstoler*, [On International Human Rights and Domestic Courts], 15 Jussens Venner (1980), pp. 302 ff.

Smith & Smith (1982): Carsten Smith & Lucy Smith: *Norsk rett og folkeretten*, [Norwegian Law and Public International Law], Oslo (1982).

SOU: Statens offentliga utredningar, [Official Reports Series of Swedish Legislative and Investigation Commissions].

SOU 1974:100: *SOU 1974:100. Internationella överenskommelser och svensk rätt*, [International Agreements and Swedish Law].

Stortinget: Kongeriket Norges Stortings Forhandlinger, [The Official Reports of Parliamentary Proceedings in Norway].

Strömberg (1989): Håkon Strömberg: *Sveriges författning*, [The Constitution of Sweden], 12th edition, Lund (1989).

Sundberg (1976): Jacob W.F. Sundberg: *Rättskällorna på 1970-tallet*, [The sources of Law in the 1970's], in *Svensk rätt i omvandling. Studier tillägnade Hilding Eek, Seve Ljungman & Folke Schmidt*, Stockholm (1976), pp. 496 ff.

Sundberg (1986): Jacob W.F. Sundberg: *Om mänskliga rättigheter i Sverige*, [On Human Rights in Sweden], SvJT 1986, pp. 653 ff.

Sundberg (1986/2): Jacob W.F. Sundberg: *Laws Rights and the European Convention on Human Rights*, Proceedings at the Colloquy in the Plenary Hall of the Svea Court of Appeals, March 29 1983, organized by the Stockholm Institute for Public and International Law, Littleton, Colorado (1986).

Sundberg (1988): Jacob W.F. Sundberg: *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of Human Rights on the International and National Level, Bologna (1988), pp. 187 ff.

Sundberg (1988/2): Jakob W.F. Sundberg: *Folkrätt och folkvett*, [International Law and Good Manners], SvJT 1988, pp. 401 ff.

SvJT: Svensk Juristtidning, [Swedish Law Review].

Sztucki (1986): Jerzy Sztucki: *The European Convention on Human Rights and the National Law*, NTfIR 1986, pp. 227 ff.

TfR: Tidsskrift for Rettsvetenskap, [Scandinavian Law Review].

UfR: Ugeskrift for Retsvæsen, [Danish Law Reports].

UfR... B: Ugeskrift for Retsvæsen, Afdeling B, [Danish Law Review].

The UN-Covenant: The International Covenant on Civil and Political Rights of 1966.

Yearbook: Yearbook of the European Convention on Human Rights, The European Commission and Court of Human Rights, The Hague (1956-)

Zahle (1986): Henrik Zahle: *Dansk forfatningsret*, [Danish Constitutional Law], Vol. 1-5, preliminary edition, Copenhagen (1986).

Zahle (1989): Henrik Zahle: *Dansk forfatningsret*, [Danish Constitutional Law], Vol. 1-3, Copenhagen (1989).

Aall (1989): Jørgen Aall: *Menneskerettighetskonvensjonene som rettskil-*

defaktor i intern norsk rett, [The Human Rights Conventions as Sources of Law [Factors] in Domestic Norwegian Law], TfR 1989, pp. 613 ff.

W.L.R.: The Weekly Law Reports (England).

Scandinavian Legal Authorities

Denmark:

The *Folketing*, [Parliament].

Folketingets Ombudsmand, [The Parliamentary Ombudsman].

Højesteret, [Supreme Court].

Landsret, [High Court].

Byret, [City Court].

Norway:

The *Storting*, [Parliament].

Stortingets ombudsmand for forvaltningen, [The Parliamentary Ombudsman].

Høyesterett, [Supreme Court].

Lagmansrett, [High Court].

Byrett, [City Court].

Sweden:

Riksdagen, [Parliament].

Riksdagens Ombudsmän, [The Parliamentary Ombudsmen].

Justitiekansleren, [The Chancellor of Justice].

Högsta Domstolen, [Supreme Court].

Hovrätt, [Court of Appeal].

Tingsrätt, [District Court].

Regeringsrätten, [Supreme Administrative Court].

Kammarrätten, [Administrative Court of Appeal].

Länsrätt, [District Administrative Court].

To Laura

*"Det kan være med nye rettskilder
som med nye piker (eller gutter).
Man begynner med å vise dem
oppmerksomhet med velformulerte
ord. Senere kan dette så naturlig
udvikle sig til et mer forpliktende
forhold."*

Carsten Smith

PART I

Introduction

CHAPTER 1

Introductory Remarks

1.1. Topic and Reasons for Choosing It.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or - as it is normally known - the European Convention on Human Rights¹ is together with its Additional Protocols are generally regarded as the most effective and advanced international system for the protection of human rights in existence today.² This is largely due to the existence and work of its supervisory organs: the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe. These organs have interpreted the Convention in such a way that it is still today, 40 years after its conclusion, a living instrument with a steadily increasing impact on the law of its signatories.

Despite the fact that *Denmark* and *Norway* were among the original signatories to the Convention on 4 November 1950, with *Sweden* signing on 28 November 1950, the impact of the Convention became visible somewhat later in *Scandinavia* than in the rest of the Memberstates of the Council of Europe. In many respects in fact it was not before the 1980's that the Convention became a living instrument in *Scandinavia*. Although *Scandinavian* academics like Professor *Frede Castberg* and Professor *Max Sørensen* played a very active role in the shaping of the Convention in its early days, it was only in the 1980's that research on the Convention and its impact on domestic law was first carried out to any extent. Although the body of studies on the Convention is on the increase at the present time, what has been written on the Convention in *Scandinavia* is still, compared to other countries, rather limited. In particular, no complete exposition of the impact of the Convention on domestic *Scandinavian* law (apart from a few Articles containing surveys) has yet been carried out.

This study attempts to remedy the lack of such a complete exposition.

¹ From now on, the European Convention on Human Rights will be referred to as "*the European Convention*", "*the Convention*" or "*the ECHR*".

² See, for example, Drzemczewski (1983), p. 3, with further references.

Chapter 1: Introductory Remarks

Thus its basic aim is to examine *the impact of the European Convention on Human Rights on domestic Scandinavian law*.

The choice of topic is theoretically as well as practically motivated.

Over the last few decades there has been an ongoing discussion in *Scandinavian* legal writings about the position of international law, including the Convention, within domestic law. Since this discussion has never focused on all three countries at the same time, it may be assumed that a comparative study of the status of international law in the domestic law of *Denmark*, *Norway* and *Sweden* will help to contribute to a better understanding. Solutions set forth in one *Scandinavian* country will undoubtedly have an impact on similar problems in the other two countries. Moreover, there are, at least in *Denmark* and *Sweden*, still some theoretical "gaps" which need to be studied further. As is well-known, the *Scandinavian* countries are traditionally considered as adhering to the "dualist" countries in which international law and domestic law are regarded as belonging to two different legal systems. This view, set forth by legal scholars who were at the same time representatives of so-called *Scandinavian* legal realism, may to some extent seem surprising and - in the words of Professor *Ole Espersen*³ - "... gives the impression of being based on doctrinal views rather than unprejudiced evaluations".⁴

However, it is not without some hesitation that one embarks on a study involving "monist" and "dualist" theories about the relationship between international law and domestic law. As Professor *Max Sørensen* pointed out 25 years ago, "[n]othing new has been said in the last twenty years in spite of the important works devoted to it during that time."⁵ On the other hand, certain trends in contemporary *Scandinavian* law may justify yet another study on the application of an international treaty in domestic law.

In *Scandinavia*, as in other European countries, increasing attention has been paid to the Convention in legislative and legal practice over the last

³ Cf. Espersen (1970), p. 14.

⁴ [... giver indtryk af at være baseret på doktrinske synspunkter end fordomsfri vurderinger.]

⁵ Cf. Max Sørensen: *Obligations of a State party to a Treaty as regards its municipal law* in A.H. Robertson (ed.): *Human Rights in National and International Law*, The Proceedings of the Second International Conference on the European Convention on Human Rights held in Vienna under the auspices of the Council of Europe and the University of Vienna, 18-20 October 1965, Manchester (1968), pp. 11 ff., at p. 11.

Topic and Reasons for Choosing It

decade. Accordingly, the question of the position of the Convention in domestic law is indeed an important one - also when considered from a practical point of view.

In *Denmark* on 19 May 1989 the *Folketing* passed a resolution in which it called on the Government to appoint a committee of experts with terms of reference to considering the advantages and disadvantages of the incorporation⁶ of the Convention into domestic *Danish* law, as well as that of putting forward proposals for such an incorporation.⁷ A committee was subsequently appointed, with Commissioner *Karsten Hagel Sørensen* of the Ministry of Justice as chairman. In *Norway*, on 30 January 1989, the Government took a decision of principle: international conventions on human rights shall be incorporated into domestic *Norwegian* law. In accordance with this decision the *Norwegian* Ministry of Justice appointed on 18 September 1989 a committee of experts, chaired by Professor *Carsten Smith*, with terms of reference more or less similar to those of the *Danish* committee. In *Sweden*, as far as is known, there are for the present no plans for incorporating the Convention into domestic law. However, in 1988 *Sweden* passed new legislation introducing judicial review of certain administrative acts, partly as a consequence of cases in which the European Court of Human Rights had found that *Sweden* had violated the Convention.⁸

One may ask why the question of passing legislation transforming the Convention into domestic law has been raised some 35 years after the ratification of the Convention.

The proposers of the *Danish* resolution enumerated three main grounds for incorporating the Convention into domestic law: (1) The Convention cannot be applied directly by the domestic courts, and it is therefore not possible for any domestic authority to ascertain whether the Convention has been infringed in concrete cases. (2) The practice of the European Commission and Court of Human Rights is dynamic; the applied domestic implementation of the Convention - the so-called *passive incorporation* (see

⁶ In this study, the word "*incorporation*" is used to signify the general reception of international legal norms into domestic legal systems of state parties; thus it encompasses both "*reformulation*" ("*transformation*") and "*adoption*". For further information, see section 2.1.

⁷ See *Folketinget* 1988-89, *Folketingsbeslutning* B 38 om indkorporering af den europæiske menneskerettighedskonvention i dansk ret.

⁸ See Act No. 1988:205. For further information, see Hans Danelius: *Judicial Control of Administration - A Swedish Proposal for Legislative Reform* in Matscher & Petzold (1988), pp. 115 ff.

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infra section 2.1) - was not able to take this development into account. (3) Finally, the proposers pointed out that to pass legislation incorporating the Convention into domestic law would itself disseminate knowledge to the Convention.

It may thus be concluded that the question of the impact of the Convention on domestic *Scandinavian* law is both theoretically and practically relevant.

1.2. Delimitation of the Study.

The study approaches the question of the impact of the Convention on domestic *Scandinavian* law from five different angles:

(1) The theoretical point of departure as to the rules governing the relationship between international law and domestic *Scandinavian* law. In accordance with recent trends in *Scandinavian* legal doctrine, it is submitted that international law in general and the ECHR in particular are *de lege lata* sources of law in domestic law. The other parts of the study attempt to elaborate on this submission.

(2) The impact of the Convention on the legislative process in *Scandinavia*. Does the Convention generally play a prominent role in the preparation of legislation? In what situations and to what extent has the Legislature passed legislation in order to fulfil obligations deriving from the Convention? Does the Legislature feel obliged to amend existing legislation as a consequence of case-law from the European Commission and Court of Human Rights?

(3) The application of the Convention in domestic *Scandinavian* law. To what extent has the Convention been applied by the domestic courts and other law-enforcers? How do law-enforcers view the Convention as a source of law in domestic law?

(4) The application of the Convention in domestic *Scandinavian* law in a comparative perspective: a survey of *Spanish*, *Italian* and *English* law regarding the domestic position of the Convention. These countries have been chosen in order to illustrate the application of the Convention in a "monist" country, in a "dualist" country into which the Convention has been incorporated into domestic law, and a purely "dualist" country.

(5) The official *Scandinavian* view on the domestic status of the Convention as it has been put forward by the respective governments in proceedings before the European Commission and Court of Human Rights. How do the

Delimitation of the Study

governments themselves regard the domestic position of the Convention? And how do the European Commission and Court view the governments' submissions in this respect?

The study is divided into five parts which each reflect the angle under which the impact of the Convention on *Scandinavian* law is studied and a part containing a general recapitulation and conclusion. It is probably fair to say that Part III, in which the application of the Convention in domestic *Scandinavian* law is examined, constitutes the core of the study. The conclusions to this part can be found in chapter 10 and - in a comparative perspective - in chapter 14.

In principle the study deals solely with the impact of the ECHR on domestic law. However, as regards the concrete application of the latter, international law in general is also included in the study, insofar as it may illustrate this application more fully. Since in this respect it is difficult to separate the ECHR from other international instruments, this part of the study is to a large extent a general discussion of the position of international law in domestic law. This is not the case, however, as regards the chapters containing a survey of English, Italian and Spanish law. The study does *not*, on the other hand, deal with the question of the position of the Convention in European Community law.

The study encompasses, with the exception of the already mentioned comparative chapters, only the *Scandinavian* countries, *i.e.* *Denmark*, *Norway* and *Sweden*. Therefore, the term *Scandinavian* rather than *Nordic* is chosen in order to signify that the study deals only with the said countries.

1.3. Material and Method.

The study is, apart from the available (basically *Scandinavian*) legal literature in this field, based on *all* reported and a number of unreported cases concerning the domestic application of the Convention from which it appears that reference to the Convention has been made in the grounds of judgment or explicitly invoked by the parties. However, no systematic investigation of unreported case-law has been carried out because the quality of the results was deemed too doubtful in comparison to the quantity of practical problems involved in carrying out this type of investigation. Moreover, *all* reported case-law from the European Commission and Court of Human Rights concerning the *Scandinavian* countries is in fact being studied. Finally, the official reports of parliamentary proceedings concerning the passing of new

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legislation or the amending of existing legislation in order to fulfil obligations under the Convention are in process of being studied.

As regards the application of the Convention in domestic law, the method of looking only at "open" references to the Convention suffers from certain shortcomings. There may be instances where e.g. a judgment from the European Court of Human Rights has been cited by counsel for the defence to support his arguments and also taken into account by the domestic court without this, for one reason or another, appearing in the reported judgment. This applies in particular to countries like *Denmark* and *Sweden* where there is a tradition of writing short and very concentrated judgments in the Supreme Courts.

The said shortcomings are to some extent sought remedied, but they can probably not, within the framework of a study as the present one, be completely avoided. Within relatively small jurisdictions as the *Scandinavian* ones, information about cases in which the Convention has been invoked and/or played an important role in deciding the case is circulated within the legal community relatively quickly. Moreover, as will be seen, the courts have recently become more willing to discuss the Convention explicitly in their judgments. Taking it all in all, one should probably be careful of not overstating the shortcomings mentioned above. The method employed undoubtedly provides a sufficient basis for getting a clear picture of how the Convention is applied in domestic *Scandinavian* law.

The method of the study is primarily analytical-descriptive. Thus attention will be paid to court practice rather than to doctrinal views set forth in legal writings. In chapter 2 it is argued that this is the most appropriate method in this context. Moreover, the study takes a comparative approach, since it constantly attempts to make comparisons between the individual *Scandinavian* countries, as well as with other domestic legal systems, namely those of the United Kingdom, Italy and Spain.

CHAPTER 2

The Effect of International Law in General in Domestic Scandinavian Law: from "Dualism" to the Sources of Law Doctrine

2.1. General Principles.

The *Scandinavian* Constitutions contain no specific provisions as to the effect of international law on domestic law.¹ The general legal principles governing this question are, however, quite clear. These principles are concerned partly with the methods for the application of international law and partly with the limits of this application.

Article 19(1) of the *Danish* Constitution stipulates:

"The King shall act on behalf of the Realm in international affairs. Provided that without the consent of the *Folketing* the King shall not undertake any act whereby the territory of the Realm will be increased or decreased, nor shall he enter into any obligation which for fulfilment requires the concurrence of the *Folketing*, or which otherwise is of major importance; nor shall the King, except with the consent of the *Folketing*, terminate any international treaty entered into with the consent of the *Folketing*...."²

A similar provision can be found in Article 26 of the *Norwegian* Constitution:

"The King shall have the right to assemble troops, to commence war in defence of the Kingdom and to make peace, to conclude and denounce treaties, to send and receive diplomatic envoys.

Treaties on matters of special importance, and in any case, treaties the implementation of which, according to the Constitution, necessitates a new law or a decision

¹ Note should, however, be taken of Article 20 of the *Danish* Constitution, Article 93 of the *Norwegian* Constitution and Chapter 10, section 5, of the *Swedish* Instrument of Government which permit the transfer of powers vested in domestic authorities to supranational organizations. For the passing of a bill transferring powers to supranational organizations a specific qualified majority in Parliament is required or else - as is the case in *Denmark* - the bill, once passed in Parliament with a normal majority, must be submitted to the Electorate for approval or rejection.

The procedure laid down in Article 20 of the *Danish* Constitution was used when *Denmark* entered the European Communities in 1973. See Act No. 447 of 11 October 1972 on *Denmark's* Accession [to the European Communities].

² Cf. Blaustein & Flanz, *Binder IV*, October 1990, *Denmark*, p. 17.

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on the part of the *Storting*, shall not be binding until the *Storting* has given its consent thereunto."³

Likewise, the *Swedish Instrument of Government* reads, *inter alia*, in Chapter 10:

"*Section 1.* An agreement with another state or with another organization shall be concluded by the Government.

Section 2. The Government may not conclude any international agreement binding upon the Realm without the *Riksdag* having approved thereof, if the agreement presupposes any amendment or abrogation of any law or the enactment of new law, nor if it otherwise concerns a matter in which the *Riksdag* shall decide.

If in such a case as is referred to in the preceding paragraph a special procedure has been prescribed for the requisite decision of the *Riksdag*, the same procedure shall be followed in connection with the approval of the agreement.

Nor may the Government in any case other than such as is referred to in the first paragraph of this Article conclude any international agreement binding upon the Realm without the *Riksdag* having approved thereof, if the agreement is of major importance. The Government may, however, omit obtaining the *Riksdag's* approval of the agreement if the interest of the Realm so requires. In such a case the Government shall instead confer with the Foreign Affairs Advisory Council before the agreement is concluded."⁴

These provisions have traditionally been regarded as government prerogatives which furnish exclusively the Government with the competence to act on behalf of the Realm in foreign affairs.⁵ However, the consent of Parliament is legally required in the more important cases. In practice Parliament can further limit the Government's competence to act on behalf of the Realm by threatening to launch a no-confidence motion which, if passed by Parliament, would oblige the Government to resign.

Since the provisions governing the treaty-making power in Article 19 of the *Danish Constitution*, Article 26 of the *Norwegian Constitution* and Chapter 10, section 5, of the *Swedish Instrument of Government* all make a distinction between, on the one hand, the conclusion of treaties and, on the other, their incorporation, it has been deduced from these that under *Danish*,

³ Ibid., Binder XI, *Norway*, October 1990, p. 2.

⁴ Ibid., Binder XVII, *Sweden*, October 1990, p. 104.

⁵ On the treaty-making power, see, *inter alia*, Ross (1980) Vol. 1, pp. 377 ff.; Andenæs (1986), p. 299; and Strömberg (1989), pp. 112 ff.

A different interpretation of the concept of government prerogatives, including treaty-making power, is expressed by Zahle (1986), Vol. 3, pp. 33 ff.

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Norwegian and Swedish law provisions of a validly concluded treaty are, *generally speaking*, not directly enforceable by the courts or administrative authorities.⁶ When and if a conflict between a treaty and an *express* provision of a domestic statute arises, the courts⁷ shall apply the domestic legal rule and not the treaty provision (*the principle of the supremacy of domestic law*). Nor can a treaty provision serve as legal authority for those acts which under domestic law, according to the so-called *principle of legality*, may be carried out only when authorized by statutory law, *i.e.* acts which encroach upon the rights and obligations of the individual.⁸ Consequently, any treaty provision which is to have domestic effects must be *incorporated* into domestic law by a domestic legal act (*the principle of transformation*). Thus, there exists in *Danish, Norwegian and Swedish law* no constitutional principle of automatic or quasi-automatic incorporation of treaties.

Similarly, in *Denmark and Norway* also international customary law requires incorporation in order to be directly applicable in domestic law,⁹ whereas this does not appear to be the case in *Sweden*.¹⁰

⁶ A considerable body of literature on the effect of treaties in general and the ECHR in particular on domestic *Scandinavian law* is now available in English. In recent years, see, *inter alia*: Drzemczewski (1983); Gulmann (1983), pp. 47 ff.; Gulmann (1987); Eilschou Holm (1986); Melander (1984); Mikkelsen (1989); Smith (1968); Rehof & Gulmann (1989); Sztucki (1986); Sundberg (1988); and *The Protection of Human Rights in the Nordic Countries*, Proceedings at the Turku-Åbo Colloquy, June 1974, published in *Revue des droits de l'homme*, Vol. 8, 1, 1975.

⁷ In this sense, "the courts" also, strictly speaking, encompasses other law-enforcing authorities.

⁸ With the exception of *Sweden*, the principle of legality is unwritten in *Scandinavian law* (see *infra* section 10.2).

⁹ In this respect the legal position in *Denmark and Norway* is different from the situation in the United Kingdom, another "dualist" country, where international customary law is part of law of the land. See, for example, R. Higgins: *The United Kingdom* in Jacobs & Roberts (1987), pp. 123 ff., at p. 125.

¹⁰ See, *inter alia*, Hans Corell: *Incorporation of the European Convention Seen from a Swedish Point of View* in Rehof & Gulmann (1989), p. 155; Hilding Eek, Ove Bring & Lars Hjerner: *Folkrätten* [International Public Law], 4th edition, Stockholm (1987), p. 260; and SOU 1974:100, p. 45, note 1.

However, Erik Holmberg & Nils Stjernquist: *Introduction. Constitutional Documents of Sweden*, Published by the Swedish Riksdag, Stockholm (1981), p. 68 (though apparently modified in *Vår författning*, [Our Constitution], Stockholm (1988), pp. 179 f.); and Hans Regnemalm in Ulf Bernitz et alii: *Finna rätt - juristens källmaterial och arbetsmetoder* [How to Find Law - the Jurist's Source Material and Working Methods], Stockholm (1985), pp. 62 ff., assert that also customary international law - as in *Denmark and Norway* - needs incorporation if it is to be directly applicable in domestic law.

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If it is found that a treaty is intended to have effects on domestic law, existing domestic law will be examined to see whether it already complies with the treaty provisions or whether changes herein are necessary. In the latter case, this will usually be achieved by Parliament enacting a statute or by an administrative act being issued pursuant to legislative authority.

The traditional method of incorporating treaties into *Scandinavian* law¹¹ - and still the most common - is by *reformulating*¹² them (also known as *transformation*), or rather that part of a treaty which requires implementation, either in a statute or an administrative regulation. It has, however, become more and more common to incorporate treaties by *adoption*,¹³ i.e. the treaty (as a whole or in part) is adopted into domestic law merely by reference to the treaty provisions either in a statute or in an administrative regulation. In this case and to the extent specified in the domestic legal instrument concerned, the provisions of the treaty are directly applicable under domestic law. The difference between the two forms of incorporation is, generally speaking, that with the *adoption* method the courts refer to international principles of interpretation, whereas in *reformulated* treaties the courts apply domestic principles rather than principles of international law. Of course, if domestic law is already in conformity with the provisions of a newly concluded treaty, it is not necessary to implement its provisions by a specific act. In these cases the fulfilment of the treaty is obtained by ascertaining that domestic law is in harmony with the treaty provisions. This is known as *passive incorporation*.¹⁴

Under such a "dualist" approach to the question of the impact on domestic law of duly concluded international obligations, the actual

¹¹ The question of the implementation of treaties in domestic *Scandinavian* law in the broadest sense was considered on a partly common basis in three national government expert committees in the early 1970's and resulted in three national reports: *Betænkning 682/1973* - (Denmark); *NOU 1972:16* (Norway); and *SOU 1974:100* (Sweden).

¹² In Danish: "*omskrivning*"; in Norwegian: "*transformasjon*"; and in Swedish: "*transformation*".

¹³ In Danish: "*indkorporering*"; in Norwegian: "*inkorporasjon*" and in Swedish: "*inkorporation*".

¹⁴ In Danish: "*konstatering af normharmoni*"; in Norwegian: "*konstatering av retsharmoni*". In Sweden this is normally not considered an independent method of incorporation, but a part of the "transformation" method.

Melander (1984), pp. 66 f., argues, however, that the *establishment of harmony between norms* should be considered as a method of incorporation, since otherwise "Sweden would be left in the curious situation that she quite often and openly does not fulfil her international obligations."

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implementation in domestic law of these treaty obligations is primarily the responsibility of the Legislature. It is for the Legislature to provide for the adjustments necessary in order that domestic law may allow for, or authorize, the implementation of international commitments. In practice this task is primarily carried out by the Government.

These methods of incorporating treaties into domestic law imply the inevitable risk of accidentally producing *divergencies* and, though more unlikely, even *clear-cut conflicts* between domestic law and a treaty. Such divergencies emerge most frequently because the Legislature, in passing new legislation, has not been aware of the potential conflict between the international obligation and domestic law, or because the scope of the international obligation has been extended, as for instance is the case with the so-called *dynamic interpretation* of the ECHR. It is difficult to imagine that the *Scandinavian* Parliaments would deliberately legislate contrary to international obligations in general and the ECHR in particular.

However, domestic *Danish, Norwegian and Swedish* law is generally presumed to be in conformity with undertaken international obligations. This is known as the *principle of presumption*. The practical consequence of this presumption is that the domestic courts, when in doubt about the interpretation of the domestic rule, shall prefer the interpretation that best complies with undertaken international obligations.

On the other hand, as pointed out by Professor *Carsten Smith*, it is "... a comparatively elementary assumption that the courts will seek to eliminate the internationally illegitimate solutions, since otherwise the state will face the risk of reactions on the international level".¹⁵ Such a vague principle does not give clear guidelines as to how the courts should resolve divergences between treaties and domestic law.

2.2. National Distinctions.

In *Denmark* an attempt has been made to give the vague *principle of presumption* some substance by making a number of distinctions.

In the case of a divergence between international law and domestic *Danish* law, it is generally asserted that, when in doubt about the interpretation of a domestic legal provision, the courts should prefer the interpretation that will best comply with international law. This is known as the *rule of*

¹⁵ Cf. Smith (1968), p. 160.

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interpretation. Nowadays it is further asserted that, in the case of a divergence between a treaty provision which has previously been observed in *Denmark* and a provision in the domestic legislation enacted subsequently, in the absence of any specific indication to the contrary, the conflict should be resolved by applying the new provision in a manner that will respect the treaty provision, even if the wording of the new provision is clearly at variance with the treaty. This is known as the *rule of presumption*: the courts should *presume* that it was not the intention of the Legislature to pass legislation contrary to *Denmark's* international obligations.

Although this distinction is not made formally in *Norway* and *Sweden*, the *principle of presumption* is considered to be applicable in both situations.¹⁶ In this study the *Danish* terminology will be used since it is more precise than the mere *principle of presumption*.

It has been discussed whether the *rule of presumption* is applicable only to international customary law, or if it is also applicable to treaties.¹⁷ Moreover, another controversial point has been whether this rule applies only to treaty provisions that have previously been observed. In a memorandum from the *Danish* Ministry of Justice - relating to certain constitutional problems on the EEC accession - it was explained that "... in the Ministry's view, *Danish* law courts would in all probability prefer a more *ad hoc* application of the law to a literal interpretation if the latter were to make the State of *Denmark* responsible under international law for an unintentional violation of a treaty."¹⁸ This view has subsequently been reaffirmed by *Danish* authorities on several occasions,¹⁹ and it has also been accepted in the legal

¹⁶ Almering (1973), p. 785, tried to introduce a similar terminology as regards *Swedish* law by making a distinction between a so-called ["utfyllnadsresonemeng"] and a ["korrektivresonemeng"] which more or less corresponds to the application of the *rule of interpretation* and the *rule of presumption* respectively. However, this terminology is not generally employed in *Swedish* legal writings.

Smith (1980), p. 306, has likewise employed the *Danish* distinction between a *rule of presumption* and a *rule of interpretation*.

¹⁷ Ross, Andersen, Lehmann & Magid (1984), p. 80, express doubts as to whether this should be the case.

¹⁸ Cf. the Ministry of Justice, pp. 80 f.

¹⁹ See, for example, The Initial Reports of Denmark of 29 March 1977 and 3 January 1978 under Article 40 of the International Covenant on Civil and Political Rights, UN-doc., CCPR/C/1/Add. 4 and Add. 19.

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doctrine.²⁰

Moreover, it has been emphasized strongly that administrative authorities are under a legal obligation to exercise their discretionary powers in such a way that administrative acts, whether they be *specific decisions or general regulations*, conform to validly concluded international obligations. This is now known as *the rule of instruction*. The courts have not yet, however, had the chance to decide once and for all whether such an obligation exists under *Danish* law, but the available case-law certainly contains statements indicating that the courts will accept this view.

The strong emphasis in *Denmark* on the administrative authorities' obligation to exercise their discretionary powers in accordance with undertaken international obligations is not to the same extent found in *Norway* and *Sweden* (see *infra* chapter 9). Thus, the *Swedish Regeringsrätten* has denied that administrative authorities have such obligations, whereas a commitment of this type has been established clearly in a *Norwegian* decision of the *Høyesterett*.

On the other hand, in *Norwegian* legal writings there has, generally speaking, been a stronger tendency to emphasize the importance of the presumption that domestic *Norwegian* law is in conformity with international law. As will be seen, part of the *Norwegian* legal doctrine has, within the present constitutional framework, attempted to reformulate the general principles governing the relationship between international law and domestic *Norwegian* law.

This tendency has roots that go back to shortly after World War II when some attempts were made by different legal writers to modify the aforesaid traditional view of the effect of international law on domestic law. These attempts were, to a large extent, based on different - *de lege lata* more or less valid - theoretical points of view, and they did not win general support in *Norwegian* constitutional theory. These writings indicated, however, an emerging change in the view of the relationship between international law and domestic *Norwegian*. This which has gradually been developed further in subsequent writings on the subject.

Perhaps the first step in this direction was taken by *Edvard Hambro* in a 1947 article where the legal position on the application of international law in domestic

²⁰ See Claus Gulmann (1987), p. 36; Gulmann, Bernhard & Lehmann (1989), p. 93; Eilschou Holm (1986), p. 89; and Opsahl (1979), p. 164.

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Norwegian law was described as follows: "It is tempting to summarize the relationship between *Norwegian* law and international law in the following manner:

The courts will apply international law directly in all those cases where it is clear that there is no conflict between *Norwegian* law and international law. Furthermore, it is clear that the courts will endeavour to interpret *Norwegian* legal rules in such a way that no conflict arises between these rules and the commands of international law. If, in spite of all attempts to the contrary, it must be admitted that there is a conflict, it will be difficult to predict for certain what the courts will do. The unanimous theory says that *Norwegian* law prevails. And it is very likely that the courts will come to the same conclusion. The position of the courts is, on the other hand, so free that other results are also possible. Thus, it is presumably quite conceivable that the courts will overrule a *Norwegian* customary rule or a *Norwegian* statute because it is incompatible with a treaty which subsequently has become binding on Norway."²¹²²

It was further asserted *de sententia ferenda* that international law should be considered a source of law in domestic *Norwegian* law. This assertion was based on the argument that there was no clear court practice which pointed in the opposite direction.²³

A fairly similar view is expressed by *Per Augdahl* in his examination of the sources of law: "But it is conceivable that one cannot avoid a conflict with international law unless the provision in question is left *entirely* out of consideration.

The case is hardly likely and, as far as one knows, has never been submitted to the courts. That these should accept the doctrine without reservations, should the occasion arise, is not likely and in my opinion not desirable either - especially not in cases where the statute is contrary to one *in optima forma* concluded treaty. To mention an extreme possibility: In an overheated frame of mind during a war a statute is passed which prescribes the death penalty for all enemy subjects who take part in acts of war. I can scarcely doubt that the courts would set aside such a statute."²⁴²⁵

²¹ [Det er fristende å sammenfatte forholdet mellom norsk rett og folkerett på følgende måte:

Domstolene vil anvende folkeretten direkte i alle de tilfelle hvor det er helt klart at det ikke er noen konflikt mellom norsk rett og folkerett. Ennvidere er det klart at domstolene vil søke å fortolke norske rettsregler på en slik måte at det ikke er konflikt mellom disse regler og folkerettens bud. Hvis det tross alle forsøk på det motsatte må indrømmes at det er en konflikt, kan det neppe forutsies sikkert hva domstolene vil gjøre. Den enstemmige teori siger at norsk rett skjærer igjennom folkeretten. Og det er meget mulig at domstolene kommer til samme resultat. På den annen side er domstolenes stilling så fri at også andre resultater er mulige. Det kan således vel tenkes at domstolene vil underkjenne en norsk sedvanerettsregel eller en norsk lov fordi den strider mot en traktat som på et etterfølgende tidspunkt er blitt bindende for Norge.]

²² Cf. Edvard Hambro: *Noen bemerkninger om forholdet mellom norsk rett og folkerett* [Some Observations on the Relationship between Norwegian Law and International Law], TFR 1947, pp. 96 ff., at p. 110.

²³ Ibid., at p. 109.

²⁴ Cf. *Per Augdahl: Rettskilder* [Sources of Law], 3rd edition, Oslo (1973), p. 79.

²⁵ [Men det kan jo tenkes at man ikke kan unngå konflikt med folkeretten uten ved å sette

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In a 1953 article *H. Kiær Mordt* asserted that a concluded treaty binds the Legislature in such a way that a subsequent statute, if incompatible with the treaty, is constitutionally inapplicable.²⁶ The Legislature, he argued, must be assumed to be constitutionally obliged after the ratification of the treaty to implement the necessary statutory rules for the incorporation of the treaty provisions as soon as possible. Accordingly, the constitution does not allow the Legislature to pass legislation contrary to the undertaken treaty obligations. The reference to a domestic "duty of transformation" is presumably overstated and the view has not been accepted in subsequent *Norwegian* constitutional theory.²⁷

In the aforesaid report (see *supra* section 2.1) from a *Norwegian* Government expert committee on the implementation of international agreements in *Norwegian* law²⁸ it was considered whether, in relation to the domestic status of international law, there was an actual requirement for a change from a "dualist" to a "monist" system. The majority in the committee did not recommend a specific solution in this respect, since it could "... be ascertained that [international law] in many cases will be *a most weighty* means of interpretation or part of the background material for the laying down of *Norwegian* law".^{29,30} This view was, *inter alia*, based on reference to *Carsten Smith's* works on the relationship between international law and domestic *Norwegian* law (see *infra* section 2.4). The Government endorsed this view and Parliament subsequently approved it.³¹

In *Sweden*, where it has previously been common to consider internation-

vedkommende lovbestemmelse helt ud av betragtning.

Tilfellet er lite praktisk og har såvidt vites aldri vært forelagt domstolene. At disse i påkommende tilfelle skulde akseptere doktrinen uten reservasjon, er neppe sannsynlig og efter min mening heller ikke ønskelig - spesielt ikke i tilfelle hvor loven er i strid med en in optima forma inngått traktat. For å nevne en ekstrem situation: I en overophetet sinnstilstand under en krig blir der vedtatt en lov som setter obligatorisk dødsstraff for alle fiendtlige undersåtter der deltar i krigshandlinger. At domstolene bør sette sig ut over en slik lov, forekommer mig lite tvilsomt.]

²⁶ Cf. *H. Kiær Mordt: Om beslag og konfiskation av herboende fienders formue* [On Seizure and Confiscation of the Property of Here-Living Enemies], TfR 1953, pp. 193 ff., at pp. 205 ff.

²⁷ See *Smith & Smith* (1982), p. 171; and *Finn Hiorthøy: Den norske lovgivning om fiendegods* [The Norwegian Legislation on the Property of Enemies], TfR 1953, pp. 379 ff., at p. 388.

²⁸ See NOU 1972:16.

²⁹ *Ibid.*, at p. 32.

³⁰ [... kan konstateres at den i mange situasjoner vil være et særdeles tungtveiende tolkningsmiddel eller del av bakgrunnsmaterialet for fastsetningen av innholdet av norsk rett.]

³¹ See *Stortingsmelding* No. 77 (1974-75).

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al law - whether international customary law or treaties - as directly applicable before domestic law-enforcing authorities,³² over the past two decades there has been a growing tendency to stress that treaties cannot be applied by domestic authorities, unless they have been incorporated into domestic law. In Sweden this is known as the *transformation theory*.³³ Although this tendency has certainly not been unanimous,³⁴ it is probably fair to conclude that in contemporary Swedish constitutional theory the *transformation theory* is the prevailing approach to the question of the effect of treaties on Swedish domestic law.³⁵ Furthermore, Swedish authorities have on a number of occasions presupposed that this is valid Swedish law.³⁶ However, as already mentioned, the *principle of presumption* is also considered part of Swedish law, although in legal writings it is expressed in somewhat guarded terms. Professor Jerzy Sztucki has described the state of Swedish law as regards the ECHR in the following way:

"Normally, however, the courts, though ultimately still applying the Swedish law only, act on an ostensible presumption that it is in conformity with the Convention. Or, to be more exact, they used to take note of the Conventional provisions in order to establish that their content did not prejudice the application of Swedish law. Apparently, whenever more than one interpretation of domestic regulation is possible the courts will choose the interpretation which best conforms to international conventions. Yet, even if this is impossible, the courts cannot set aside the Swedish law in force."³⁷

This use of guarded terms in describing the impact of treaties on Swedish domestic law seemed to be well-founded, since, as will be seen, Swedish

³² See, for a survey, Ole Espersen (1968), pp. 284 ff.; and SOU 1974:100, p. 45 note 1.

³³ In this study the term "*transformation theory*" will be used synonymously both with the term "*principle of transformation*" and the term the "*principle of the supremacy of domestic law*" when discussing Swedish law, since the term "*transformation theory*" has a precise meaning and is widely used in Swedish legal writings.

³⁴ For further information on the debate of the transformation theory in Sweden, see, for example, Sundberg (1988), pp. 200 ff.

³⁵ Cf. Danelius (1984), p. 56. In *Om mänskliga rättigheter i Sverige - en replik*, [On Human Rights in Sweden - a Replication], SvJT 1987, pp. 64 ff., at p. 65, Hans Danelius pointed out that his view was solely *de lege lata*, and that it might improve the protection of individuals' rights if the Convention were incorporated into domestic Swedish law. This view is maintained in Danelius (1989), p. 70.

³⁶ See, for example, The Initial Report of Sweden of 7 April 1977 under Article 40 of the International Covenant of Civil and Political Rights, UN-doc. CCPR/C/1/Add. 9.

³⁷ Cf. Sztucki (1986), p. 227.

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courts have been more willing than *Danish* and *Norwegian* courts to recognize the existence of conflicts between treaties and domestic law, as well as maintaining strongly that *Swedish* law should prevail in such cases. However, recent *Swedish* court practice has also become more open *vis-à-vis* the ECHR, and it is now a question whether this restricted view on the application of the Convention in domestic *Swedish* law is an appropriate one.

2.3. The Limits for the Application of the Principle of Presumption.

At a first glance, the *principle of presumption* seems to be a useful tool in resolving cases of conflict between international law and domestic *Scandinavian* law. However, its vague contour does not provide clear guidelines as to the resolving of such conflicts. This is probably due to the fact that the principle has two different functions. On the one hand, it serves as legitimation for the application of international law in the domestic legal order and, on the other, as a principle of interpretation for conflicts between international law and domestic law in concrete cases. Even within each of these functions the *principle of presumption* is, judged on its own premises, to some extent self-contradictory from a constitutional point of view.

As regards the *principle of presumption* as legitimation for the application of international law in domestic law, it is usual to draw a distinction between *international customary law* and *treaties*. Historically, the distinction is probably well-founded. The competence to conclude treaties rested with the Government (the King) alone, and there was a real risk of undermining the influence of Parliament if treaties *per se* were applied as domestic law. The governments did not, it was asserted, obtain control in the same way over whether *Denmark*, *Norway* or *Sweden* should be bound by international customary law. Moreover, as regards international customary law this presumption has been legitimized by the fact that for a long period now the *Scandinavian* countries have recognized the customs of international law as expressive of the fundamental principles of law and have insisted that other states respect these customs too. Finally, it should be pointed out that if legitimation for the application of international law in domestic law is a presumption that the Legislature did not want to infringe international law, the presumption is easier to defend as regards international customary law than as regards treaties which have already been concluded and therefore ought to be

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known to the Legislature.³⁸

Accordingly, the *principle of presumption* (the *rule of interpretation*) is regarded as valid in every situation in which a divergency between international law - whether *treaties* or *international customary law* - and domestic law arises, provided domestic law can be interpreted in more than one way. Thus the application of the principle in this respect does not give rise to particular problems.

However, the scope of the *principle of presumption* in cases in which the domestic rule only provides for one interpretation (the *rule of presumption*) is more vague. As has been seen, in these situations it is also asserted that the courts can apply domestic law in conformity with undertaken international obligations, even though, according to an ordinary interpretation of the relevant domestic provision, this is not possible. This view is based on the pronounced, but *fictitious*, presumption that it was not the Legislature's intention to legislate in a way that was contrary to undertaken international obligations.³⁹ As pointed out by P.J. Duffy, "[i]ndeed there may be a practical argument for allowing use of the [European] Convention. It would be quite unrealistic for Parliament to attempt to discover and amend all legislative ambiguities which might be contrary to the newly-acquired international obligation of such general nature as the Convention; hence *practical considerations* may be argued to dictate that ambiguities should be construed in accordance with the Convention in the case of prior legislation" (emphasis added).⁴⁰ From a *theoretical-analytical* point of view it is, of course, difficult, if not impossible, to have any exact knowledge of the Legislature's intentions in this respect since, according to the principle itself, he was not aware of the problem.

Therefore, certain difficulties have arisen in defining precisely to what degree the *principle of presumption* (the *rule of presumption*) is applicable in cases where domestic law only provides for one interpretation. Some legal scholars have asserted that, in this instance, the principle is only applicable to international customary law and treaties which have been concluded

³⁸ See Espersen (1970), p. 159; Eilschou Holm (1981), p. 126; and Madsen (1986), pp. 34 f.

³⁹ Cf. Zahle (1986), p. 121.

⁴⁰ Cf. P.J. Duffy: *English Law and the European Convention on Human Rights*, 29 *International and Comparative Law Quarterly*, pp. 585 ff., at p. 539.

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previous to the enactment of the statute at issue.⁴¹ Others have argued that the principle is generally applicable insofar as the domestic rule is not deprived of its real substance.⁴² However, it is obvious that the principle cannot be applicable to treaties concluded after the statute at issue has been passed if the presumption of the Legislature's intentions is to be taken seriously.

One may, however, question the premises for drawing this distinction between international customary law and treaties.

As regards *treaties*, it may be questioned whether the assumption that the Legislature did not intend to legislate contrary to undertaken international obligations, implied in the principle of presumption, can be maintained when the constitutional point of departure is taken into account. The *Scandinavian* Constitutions are founded on the principle of the separation of powers in which the legislative power is vested in the Government and Parliament conjointly. The Executive is not considered to have independent competence to issue general regulations; all administrative regulations must be authorized by law in accordance with the *principle of legality*. Article 19(1) of the *Danish* Constitution, Article 26 of the *Norwegian* Constitution and Chapter 10, section 2, of the *Swedish* Instrument of Government, which furnish the respective governments with the competence to conclude treaties, should be seen in this light. Thus the requirement of incorporation of treaty obligations is intended to ensure that the competence to legislate is not displaced from the Legislature to the Government. Consequently, the *principle of presumption* is, so to say, in direct contradiction to the *principle of transformation*.

These constitutional principles for not undermining the legislative procedure carry some weight in relation to treaties.⁴³ However, there has been some willingness to stretch a point on these constitutional principles in order not to violate undertaken international obligations: the "*presumption*" of what the Legislature might or might not have intended is introduced as a means of legitimation for derogating from the constitutional point of de-

⁴¹ Cf. Ross, Andersen, Lehmann & Magid (1984), pp. 75 ff. See also Frede Castberg: *Norges Statsforfatning* [The Constitution of Norway], 2nd edition, Oslo (1947), Vol. 2, p. 172, where the *principle of presumption* is only regarded as applicable in relation to treaties which contain a codification of already applicable international law.

⁴² See Espersen (1970), p. 388; Gulmann (1983), p. 50; Holst-Christensen (1989), p. 49; and Madsen (1986), p. 39.

⁴³ Cf. Eilshou Holm (1981), p. 126.

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parture.

On the other hand, these constitutional principles should not be overstated.⁴⁴ The consent of Parliament is required before a treaty of some importance can be ratified. Once this consent has been obtained, there can be no real objection based on constitutional principles if the treaty, although not incorporated by a specific act, is later applied by the courts with respect to the *principle of legality*.⁴⁵ Since the *principle of legality* within the field of human rights must be assumed to have only minor significance (see *infra* section 10.2), it is unobjectionable that in these situations Parliament employ a more simple procedure than when passing legislation. The power to legislate is not transferred from Parliament to the Government in these situations, any more than in other cases in which it is accepted that the courts create law, as for example with the judicial review of statutes.⁴⁶ The normal remedies by which Parliaments control governments are still available. In a parliamentary system of government a conflict between Parliament, on the one hand, and the Government, on the other, is not likely to occur. Conflicts within Parliament are more likely to occur, e.g. if a treaty has been ratified during one Parliament and the majority changes after a general election: then the new Parliament may not want to incorporate the treaty into domestic law.⁴⁷ Finally, one should not forget that through the present system of government Parliament has considerable - political - opportunities for influencing foreign policy, including the conclusion of treaties.

As regards *international customary law* there have, in recent years, been some instances proving that the basis of a custom has been established through a number of states' co-ordinated efforts or through the drafting of UN-resolutions or treaties. By participating in this co-ordination or by voting in the UN the Government exercises its influence on what is going to apply as international customary law. However, the consent of Parliament or of a parliamentary committee will usually be obtained in such situations.⁴⁸

⁴⁴ Cf. Mamlöf & Mellqvist (1982), p. 54.

⁴⁵ Cf. Aall (1989), p. 620.

⁴⁶ Cf. Trond Dolva: *Internasjonale menneskerettighetskonvensjoner og intern norsk rett*, [International Human Rights Conventions and Domestic Norwegian Law], Tfr 1990, pp. 121 ff., at p. 131.; and Edward Hambro: *Folkerettsanvendelse ved norske domstoler*, [The Application of International Law in Norwegian Courts], Tfr 1955, pp. 48 ff., at p. 55.

⁴⁷ Cf. Helgesen (1982), pp. 99 f.

⁴⁸ Cf. Madsen (1986), p. 35.

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It may, apart from the obvious practical advantages, seem unnecessary, and from an analytical point of view even misleading, to draw a distinction between the *rule of interpretation* and the *rule of presumption*, as is the case in *Denmark*. The criterion for distinguishing between the two rules is solely whether the domestic provision leaves any doubt as to its interpretation. First of all, it is not possible to distinguish between situations in which the domestic statutory provision is clear and when it is ambiguous: there is a smooth transition between these extremes which is not, strictly speaking, reflected in the distinction between the *rule of interpretation* and the *rule of presumption*. Moreover, as pointed out by professor *Henrik Zahle*, the distinction itself seems to presuppose that the process of interpretation is divided into different phases. Thus, the first phase is an interpretation of domestic law and, provided that any doubt subsists, the interpretation passes to the next phase which includes international law.⁴⁹ This division into phases probably does not correspond to practice (see *infra* section 6.3). When the presupposed doubt exists, this may be due solely to the existence of relevant international law which both creates the doubt, so to say, and solves it too.⁵⁰ In this sense the legal position in *Scandinavia* seems to be different to that of the United Kingdom where the courts usually apply a "preliminary test of ambiguity" regarding the domestic provision.⁵¹

As indicated, constitutional principles leave ample room for ambiguity. Thus, it is difficult to conclude anything certain from the constitutional provisions governing treaty-making power as to the position of international law in domestic law on the basis of these principles.⁵² Moreover, legal doctrine seems to have tried to have had its cake and eat it at the same time, so to say. This applies in particular to the contradiction between the *principle of presumption* and the *principle of transformation*.

Thus, the weight of constitutional arguments is not overwhelming and, since these arguments cannot provide a proper answer to the question of the position of international law in domestic law, it seems reasonable to

⁴⁹ Cf. Zahle (1989), Vol. 2, p. 97.

⁵⁰ Ibid. See also Ross (1958), pp. 135 ff.

⁵¹ Cf. P.J. Duffy, *op.cit.*, p. 590.

⁵² Cf. Frederik Harhoff: *Skønheden og udyret*, [The Beauty and the Beast], retsvidenskabeligt Institut B, Studier nr. 18, Årsberetning 1986, Copenhagen (1987), pp. 69 ff., at p. 73; and Zahle (1989), Vol. 2, pp. 95 f.

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formulate a new approach to the question of the application of international law in domestic *Scandinavian* law.

2.4. Reformulation of the Traditional View on the Relationship between International Law and Domestic Law.

Notably in *Norwegian* legal literature, but also in recent *Danish* legal writings, there is now a tendency to agree that international law is one of the *sources of law* to be applied by domestic courts. Since the commonly used *Scandinavian* concept of a "source of law" is a very broad one indeed - it may be understood to cover all factors of a general nature on which the judge shall or may rely when deciding a case⁵³ - such a statement is in itself of

⁵³ It is a common feature of modern *Scandinavian* legal theory that it recognizes that a number of different factors can be regarded as sources of law.

Among *Scandinavian* legal philosophers *Alf Ross* is probably the most prominent and best known outside the region. In his book *On Law and Justice*, London (1958), p. 77, he defined sources of law in the following manner:

"Sources of law", then, are understood to mean the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision; with the qualification that this influence can vary - from those "sources" which furnish the judge with a ready rule of law which he merely has to accept, to those "sources" which offer him nothing more than ideas and inspiration from which he himself has to formulate the rule he needs.

Since the ideology of the sources of law varies from one legal system to another, its description is a task for doctrinal study of law (the *doctrine* of the sources of law). This task, as we have seen, can only be accomplished through a detailed study of the manner in which the courts of a country do in fact proceed to find the norms on which their decisions are based. And the task of jurisprudence here can only be the establishment and identification of general types of sources of law which according to experience are found in all mature legal systems (the *theory* of the sources of law)."

As to the practical consequences of this theoretical point of departure, *Alf Ross* pointed out that the sources of law are: *Legislation* (in the widest sense), *custom*, *precedent* and *"reason"* or - as it is often called in *Scandinavia* - *the nature of the case*.

Since *Ross* does not make a detailed analysis of the material and the specific principles which underlie the rules of law, it appears from his own starting point that the limitation of sources of law to the above-mentioned four must be considered as completely arbitrary.

Thus, subsequent legal theory has on the same theoretical basis been more inclined to recognize other sources of law as well. This applies in particular to Professor *Torstein Eckhoff* who rejects the use of the concept "source of law" since it lends itself to associations such as "law can be drawn directly like water from a spring", cf. *Eckhoff* (1987), pp. 17 f. He does not give a general definition of the sources of law, but draws a distinction between *sources of law factors* and *principles of sources of law*. A source of law factor is an argument which one is *permitted*, but *not always required* to include in legal reasoning. The principles of sources of law give guidance as to what is necessary and permitted to take into account when one solves a legal controversy. And they indicate what weight should be ascribed to the different considerations. As regards the sources of law factors, *Eckhoff* mentions legislation, the travaux préparatoires of legislation, court practice, other forms of practice, custom, legal doctrine and real considerations (i.e. the nature of the case), cf. *Eckhoff* (1987), p. 18. However, *Eckhoff* emphasizes strongly that this list of sources of law factors does not claim to be complete and he also discusses international law in his exposition of the sources of law.

A largely similar view is expressed by Professor *Stig Strömholm* in *Rätt, rättskällor och rättsstillämpning* [Law, Sources of Law and the Application of Law], Lund (1981), pp. 296 ff.

It is probably fair to conclude that *Eckhoff's* and *Strömholm's* "definitions" of the sources

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no great help. According to this definition international law may *per se* be regarded as a source of domestic law, because it can be used as the basis for arguments on the specific interpretation of the latter. So far, the recognition of international law as a source of law in domestic law adds nothing new to the general principles outlined in section 2.1. However, in common usage the concept of sources of law is probably applied in a narrower sense, that is, the term "*sources of law*" is reserved to factors of a general nature on which the judge not only shall or may rely when deciding a case, but factors which actually carry some weight in this respect; and it is generally asserted that the courts have in fact been more willing to apply international law than implied in the aforesaid general principles governing the relationship between international law and domestic law.

That international law should be considered a source of law in domestic law was first realized by Professor *Carsten Smith* who some 20 years ago concluded as regards *Norwegian law*:

"In my opinion the *Norwegian* Courts have in fact expressed a more positive view on the municipal significance of international law than the above-mentioned principle suggests. A foundation has therefore now been provided for a reformulation of these maxims. I will attempt to demonstrate that it is today more accurate to draw up a principle of *municipal effectivation* of the norms of international law, a principle of *direct application of international law*, and a more *limited* principle of supremacy of *statute law* in *certain cases of conflict*."⁵⁴

In a 1980 article, *Carsten Smith* went one step further and stressed the sources of law perspective-even more forcefully:

"The question of the position of international law before *Norwegian* (domestic) courts is a primary one of *sources of law* and it ought not to be resolved, as has generally been the case, by laying down constitutional rules."^{55,56}

of law are expressive of the view in contemporary *Scandinavian* legal theory.

In more recent *Scandinavian* writings on the sources of law, there is furthermore a strong tendency to emphasize the *internationalization* of the sources of law in the sense that different kinds of non-national sources are becoming more and more significant in the domestic application of law. See, for example, Peter Blume: *Til en ny rettskildelære*, [To a New Doctrine of the Sources of Law], TfR 1990, pp. 863 ff., at pp. 864 and 882 ff; and Ruth Nielsen: *Retskilderne*, [The Sources of Law], 2nd edition, Copenhagen (1989), pp. 20 ff.

⁵⁴ Cf. Smith (1968), p. 157.

⁵⁵ [Spørsmålet om folkerettens stilling ved norske (nationale) domstoler er primært av rettskildemessig art, og det bør ikke løses, slik man gjennomgående har gjort, ved oppstilling av statsrettslige regler.]

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In the writings of *Carsten Smith* much attention has been paid to the cases deriving from the purge after the German occupation. In most of these cases it was not quite clear whether, or to what extent, international law made demands on domestic law.⁵⁷ Moreover, the situation was indeed extraordinary and one should probably be careful not to overstate the general validity of these cases. However, the writings of *Carsten Smith* have undoubtedly introduced more subtlety into the discussion of the position of international law in domestic *Scandinavian* law. His views, as will be seen, have clearly had an impact on *Danish* legal writings on the subject.

In a work from the early 1980's, *Jan Erik Helgesen* has tried to discuss the question of the position of international law in *Norwegian* law from a pure source of law point of view. Accordingly, his perspective was: "The question of "the position of international law" before *Norwegian* courts - or before *Norwegian* law-enforcers in general - is not primarily, but solely a question of sources of law."^{58,59} An analysis of the *Norwegian* theory and relevant case-law led *Helgesen* to the following conclusion that "... the terminological consequence of my view, that arguments of international law are relevant and that the law-enforcer is not facing a fundamentally different task here as compared to other cases of conflict [of rules], must be that "international law is part of *Norwegian* law".^{60,61}

This conclusion is indeed confirmed by a more recent study by Justice *Trond Dolva* who states that the openness of *Norwegian* law *vis-à-vis* international law makes it doubtful whether it is useful to characterize the present state of *Norwegian* law by the use of the word "dualism".⁶²

In *Denmark* Professor *Ole Espersen* appears to be the first to try to

⁵⁶ Cf. *Smith* (1980), p. 307.

⁵⁷ See *Helgesen* (1982), p. 40.

⁵⁸ *Ibid.*, at p. 6.

⁵⁹ [Mitt perspektiv blir derfor: Spørsmålet om "folkerettens stilling" ved norske domstoler - eller hos norske rettsanvendere generelt - er ikke primært, men utelukkende av rettskildemessig art.]

⁶⁰ [Den terminologiske konsekvens av mitt syn, at folkerettslige argumenter er relevante og at rettsanvenderen ikke står overfor en prinsipielt annerledes oppgave her enn ved øvrige motstridstilfelle, må bli at "folkerett er en del av norsk ret.]

⁶¹ *Ibid.*, at p. 115.

⁶² Cf. *Trond Dolva*, *op.cit.*, p. 123.

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approach the question of the status of international law within the *Danish* legal order from a sources of law perspective. This view was, in contrast to that of *Carsten Smith*, based on theoretical considerations rather than studies of the case-law in the field: "On the basis of Ross' theory on the sources of law, including when the doctrine is submitted to the adjustment which has been proposed, one may claim as a matter of course that treaties are part of domestic law." ⁶³ The "adjustment which has been proposed" is, that it is not conceptually possible to distinguish between the *ideology of sources of law* and the *ideology of method or interpretation*.⁶⁵ According to *Ole Espersen* the real problem is to what extent international law is part of the factors which determine the judge's formulation of the rule on which he bases his decision.⁶⁶ This basic observation is generally reflected in subsequent legal writings on the topic.⁶⁷ However, *Espersen* draws no practical consequences from this starting point on how to resolve conflicts between international and domestic law; he relies on the *principle of transformation*, the *rule of interpretation*, the *rule of presumption* and he introduces the *rule of instruction*.

Similar points of view with regard to *Danish* law have been put forward by Professor *Henrik Zahle*, who has maintained that nothing can be deduced from Article 19 of the *Danish* Constitution with regard to the position of international law within the *Danish* legal order. Accordingly,

"... [the] application of international law - or rather of international sources of law - must be judged in line with other types of sources of law [...] Hence (1) international law is *relevant* for the judgment of domestic sources of law, and (2) if international law and domestic law point in different directions a conflict of laws is present. Thus, as the theory of the sources of law appears today, such conflicts cannot be resolved by referring to simple principles."⁶⁸

⁶³ [På grundlag af Ross' retskildelære, herunder når læren er undergivet den justering, som lige er foreslået, tør det herefter hævdes, at traktater uden videre er en del af intern ret.]

⁶⁴ Cf. *Espersen* (1970), p. 163.

⁶⁵ *Ibid.*, at pp. 159 ff.

⁶⁶ *Ibid.*, p. 164.

⁶⁷ See *Gulmann* (1983), p. 48.

⁶⁸ [Anvendelsen af international ret - eller snarere internationalt retskildemateriale - ved afgørelsen af et nationalt retsspørgsmål må bedømmes på linie med anvendelse af andre typer af forskelligt retskildemateriale... Heri ligger (1) international ret er *relevant* ved bedømmelsen af nationale retsspørgsmål, og (2) hvis internationalt og nationalt retskildemateriale trækker

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So far, no systematic study - seen from a source of law perspective - of the position of international law in domestic *Danish* law has been carried out.

In *Sweden* Professor *Jacob W.F. Sundberg* has touched upon similar issues. Thus he has asserted that the "... European Convention is part of the *Swedish sources of law doctrine*" (emphasis added), since

"... those who examine the Institute's [The Stockholm Institute of Public and International Law] annual reports to Strasbourg will find that it is in no way unusual that the argumentation before *Swedish* courts should refer to the provisions of the European Convention and - depending on the counsel's capability and commitment - also to court practice in Strasbourg. It is more difficult to find a court referring to the European Convention in its summing-up and decision, although it is not so unusual to find such references in dissenting opinions. This should, however, not mislead with regard to the legal effects of the Convention. It may be useful to compare with the precedent doctrine. For a long time it was extremely difficult to find the precedent referred to in summing-ups and decisions in *Swedish* judgments without anybody for this reason seriously asserting that in *Sweden* a precedent doctrine and a precedent effect did not exist."⁷⁰

So far, it would not seem that this point of view has been wither theoretically developed as extensively in *Sweden* as in *Denmark* or more notably in *Norway*, nor has it been generally accepted in contemporary *Swedish* constitutional theory; emphasis has been put primarily on criticizing writers in favour of the *transformation theory* and the case-law reflecting this view.⁷²

i forskellig retning, foreligger en regelkonflikt. Således som retskildelæren i dag ser ud, lader sådanne konflikter sig ikke løse efter enkle principper"].

⁶⁹ Cf. Zahle (1989), Vol. 2, p. 101.

⁷⁰ [Den som granskar Institutes årsrapporter till Strasbourg skall finna att det i svensk domstolsprocess ingalunda är ovanligt att argumenteringen inför domstolen hänför sig just till Europakonventionens olika artiklar och ibland - beroende på advokaternas kunnighet och engagemang - också till rättspraxis in Strasbourg. Det är svårare att finna att en domstol i kläm och beslut åberopat Europakonventionen, ehuru det icke är så ovanligt att finna det i dissenser. Detta bör dock icke missleda beträffande konventionens rättsverkan. Det kan vara nyttigt att jämföra med prejudikatsläran. Det var också länge utomordentligt svårt att finna prejudikat åberopade i kläm och slut i svenska domar utan att någon för den skull ville hävda på allvar att det i Sverige skulle helt felas prejudikatslära och prejudikatsverkan.]

⁷¹ Cf. Sundberg (1986), p. 660. See also Almering (1973), pp. 735 f., who asserts that to the extent that non-incorporated treaty provisions influence the courts, these provisions represent an independent source of law.

⁷² Fredrik G.E. Sundberg: *Om ingripanden mot administrativt frihetsberövande i ett rättighetsperspektiv*, [On Interference against Persons Administratively deprived of their Liberty - in a Rights Perspective], *Förvaltningsrättslig tidskrift* 1983, pp. 200 ff., at p. 205, has suggested that Chapter 11, section 14, of the Instrument of Government, granting the courts the competence to review the constitutionality of legislation, also enables the courts to review

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It is, however, difficult for a non-Swede to understand the somewhat exaggerated and dogmatic arguments put forward now and then in the *Swedish* debate both for and against giving treaties a stronger position in domestic law.⁷³

By emphasizing that international law is a source of law in domestic law, it is emphasized that it is not possible to resolve conflicts between international law and domestic law on the basis of simple principles. While the more traditional view focuses on clear conflicts between international law and domestic law, the source of law point of view focuses on the more frequent minor divergences between the two. The approach to the question of the impact of international law on domestic law is thus in the process of being methodically changed from a *normative* point of view to a more *descriptive* one. In the words of Professor *Carsten Smith*,

"... it is erroneous to assume that one can arrive at clear rules as to which norms, the national or the international, shall take precedence in cases of conflict. That the discussion has for so long been carried out on such lines in this field can probably be explained by the fact that the conflict has taken a particularly sharp and dramatic form because there were different legal systems which collided. But if one recognizes at the outset that international law is a part of *Norwegian* law, there is also reason to draw the consequence that this kind of norm conflict must be resolved in the same manner as are conflicts between different municipal legal norms."⁷⁴

Based on extensive studies of the available *Norwegian* case-law, Professor *Carsten Smith* has concluded that the only restriction on the law-enforcing authorities' application of international law is the *principle of legality*: international law cannot substitute the requirement of statutory authorization laid down in this principle. Moreover, he has pointed to a number of specific considerations as having an impact on the solving of conflicts between international law and domestic law. Finally, it should be noted that to the extent international law is regarded as a source of law in domestic law, the distinction between international customary law and treaties loses its relevance. The interest then centres on the courts' application of international law - be it international customary law or treaties.

the conformity of statutes with the Convention and, if necessary, set aside domestic statutory provisions.

⁷³ See Hilding Eek, Ove Bring & Lars Hjemmer, *op.cit.*, p. 261.

⁷⁴ Cf. Smith (1968), p. 192. See also Smith (1962), pp. 182 ff.; Smith (1964), pp. 356 ff.; and Smith (1980), pp. 302 ff.

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However, the source of law perspective does not mean that international law, when it conflicts with domestic law, should prevail absolutely. Such a conflict must be resolved on the basis of an overall evaluation of the facts of the case - including the different sources of law factors. As in other cases of conflict between, on the one hand, a statutory rule and, on the other, another source of the law, it is certain that the statutory rule will carry considerable weight. But the considerations pointing in the opposite direction may carry such weight that a total evaluation makes the international rule of law prevail.

The acceptance of international law as a source of law has been criticized because it does not help to resolve problems in the relationship between the international sources and other domestic sources, *i.e.* how possible conflicts between international and domestic sources may be resolved, and it does not help to decide whether a non-incorporated international legal rule may or may not create directly enforceable obligations and rights for individuals.⁷⁵

This may be so, but, as will be seen in the following chapters, the guidelines provided by what could be called the *source of law doctrine* seem nevertheless to be more adequate than the traditional general principles governing the application of international law in domestic law. This is undoubtedly due to the fact that these guidelines are based on the available case-law in the field rather than on a rigid constitutional normative point of view.

2.5. Tentative Conclusions.

The source of law perspective and the more traditional general principles seem at first to be at loggerheads with one another. This may, however, not be the case. While the traditional view focuses on the clear-cut conflicts between international law and domestic law and emphasizes that, in such cases, the constitutional principles must predominate, the writers in favour of the sources of law approach underline that more attention should be paid to the more frequent cases in which only minor - and presumerably unintentional - divergences between international law and domestic law appear. Moreover, they emphasize that it is not possible to resolve such conflicts by simple means. A conflict between international law and domestic law does not differ from conflicts between two domestic rules and, consequently, it must be resolved by similar means. In other words, where the traditional

⁷⁵ See Gulmann (1987), p. 34.

Reformulation of the Traditional View

view is *normative* in its approach, the sources of law perspective is *descriptive*, i.e. it aims at describing the law-enforcing authorities' application of international law.

As regards the ECHR it is unlikely that clear-cut conflicts between the Convention and domestic law will emerge, since rights similar to those in the Convention are to a large extent embodied in the national Constitutions. As pointed out by Dr. *Niels Eilshou Holm*, "... in the context presented by the European Convention on Human Rights, the impact of this reservation should not be exaggerated. In this particular area the practical problem confronting domestic authorities is to find means of preventing accidental infringements of the developing European standards of human rights from the dynamic element of commitments undertaken."⁷⁶

It is submitted in this study that the ECHR *de lege lata* is a source of law in domestic *Scandinavian* law, and that this *de sententia ferenda* and *de lege ferenda* is desirable. Thus it is argued that legal practice, taken as a whole and with certain exceptions, has gone so far in its application of the Convention that this application can only be explained by the fact that the Convention holds the position of a source of law in domestic law. Accordingly, the study as such takes a source of law perspective on the application of the Convention in domestic *Scandinavian* law. Furthermore, the study seeks to elaborate more generally on the source of law perspective.

⁷⁶ Cf. Eilshou Holm (1986), p. 94.

CHAPTER 3

The Attitude taken by the Scandinavian Countries before ratifying the European Convention

3.1. Denmark.

Denmark was one of the original signatories of the European Convention on 4 November 1950. The Convention was ratified on 13 April 1953.

Article 19 (see *supra* section 2.1) of the *Danish* Constitution of 1953 lays down that the consent of the *Folketing*, *inter alia*, is required when the Government undertakes international obligations which require the concurrence of the *Folketing* for fulfilment or which otherwise are of major importance. A similar provision was embodied in the Constitution of 1920, still in force when the Convention was ratified. In accordance with these provisions the *Rigsdag*¹ approved the ratification by a resolution - which is distinct from an act of incorporation² - passed on 20 March 1953.³

Prior to the ratification, the Government reviewed the compatibility of *Danish* law with the provisions of the Convention. This review showed that, in the Government's view, *Danish* law was consistent with the provisions of the Convention, although a few provisions of the statute on social assistance were amended by Act No. 33 of 25 February 1953. This amendment abolished the right to detain a person who failed either to support his family or to pay alimony or maintenance. According to the Minister of Foreign Affairs' oral introduction to the proposal on the basis of which the consent of the *Folketing* to the ratification of the Convention was obtained, the amendment of this statute was the reason why so much time had passed since the conclusion of the Convention. The Government had, he explained, been of

¹ According to the Constitution of 1920 the *Rigsdag* consisted of two houses: The *Folketing* and the *Landsting*. The *Landsting* was abolished when the Constitution was amended in 1953.

² Parliamentary resolutions do not possess the status of legislation and cannot change existing law. They are, *inter alia*, used by the *Folketing* to give its consent to the ratification of treaties which have been concluded by the Government; or when the *Folketing* wants the Government to introduce a Bill on a certain topic according to the specifications contained in the resolution; and also when a no-confidence motion is launched.

³ See RT 1952-53, *Folketinget*, cols. 1100, 1141 and 1385; *Tillæg A*, col.; *Tillæg B*, col. 429; *Tillæg C*, col. 475 f.; *Landstinget*, cols. 183, 676, 689 and 753.

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the opinion, however, "... that a country like *Denmark* which so clearly professes the principles of which the Convention is the expression, ought not to make any reservations but should wait to ratify until this can be done without reservations of any kind."⁴⁵

When the proposal was referred to a committee, the question of the compatibility of *Danish* law and the Convention was posed again. A list of specific questions was addressed to the Minister of Foreign Affairs. After having sent enquiries on the subject to the other Ministries involved, the Minister answered the questions in a memorandum of 22 January 1953 in such way that in its report of 27 February 1953 the committee passed the proposal without further discussion.⁶

A central question for the committee was the relationship between section 13 of the *Danish* Penal Code which prescribes that punishable acts carried out in self-defence within certain limits are exempt from punishment and Article 2 of the Convention which protects the right to life.

The questionable point was whether the phrase "absolutely necessary" of Article 2(2) in the Convention was more restrictive than the concept of self-defence in the *Danish* Penal Code.

The Ministry of Justice maintained that, according to the *Danish* provision, self-defence is only exempted from punishment when the "offender" has protected himself against an "imminent unlawful assault" and the act of self-defence is proportional. The provision should, therefore, be considered compatible with Article 2 of the Convention.⁷

There can be little doubt that, after amending the statute on social assistance, the Government and the *Rigsdag* considered *Danish* law to be compatible with the Convention. The *Rigsdag's* consent to the ratification of the Convention seemed to have been given on the presupposition that *Danish* law was compatible with the Convention. One could probably go one step further and say that the *Rigsdag* considered it to be beyond any doubt that this was the case; the spokesmen in the *Rigsdag* were more interested in discussing how, under the system set up by the Convention, human rights could be protected

⁴ See RT 1952-53, Folketinget, col. 1389.

⁵ [Regeringen har imidlertid været af den mening, at et land som Danmark, der så klart bekender sig til de principper, som konventionen er udtryk for, ikke burde tage forbehold ved ratifikationen af denne konvention, men vente med at ratificere, indtil dette kunne ske uden forbehold af nogen art.]

⁶ See RT 1952-53, Tillæg B, cols. 429 f.

⁷ Ibid.

Denmark

in other countries. Having this in mind, one could therefore hardly imagine that the rules of the Convention ought to be directly applicable in *Danish* courts or normative for administrative authorities in their relationship with the citizens.⁸ This attitude should be seen in connection with the amendment of the *Danish* Constitution which was also completed in 1953. This amendment contained, *inter alia*, a modest expansion of the scope of some of the individual and political rights embodied in the *Danish* Constitution. The former President of the *Højesteret*, *Peter Christensen*, has recently characterized the *Danish* attitude to the ratification of the Convention in the following way:

"It is expressive of the significance which one, when the Constitution was amended in 1953, ascribed to the contemporary European Convention on Human Rights and the Universal Declaration of Human Rights, adopted by the UN in 1948, that none of these texts obtained any influence on the new Constitution's description of the rights of the citizens. Although the international texts together contain more rights than the previous *Danish* Constitutions and, furthermore, are far more elaborate in their descriptions of the rights, in the new Constitution there was not touched much on the hereditary wording which, for more than one hundred years [and] to common satisfaction, had been the written basis for the civic rights of the Danes."⁹¹⁰

3.2. Norway.

Like *Denmark*, *Norway* was also one of the original signatories of the European Convention of Human Rights on 4 November 1950. The Convention was ratified on 15 January 1952.

In accordance with Article 26 (see *supra* section 2.1) of the *Norwegian* Constitution the *Storting* approved the ratification on the recommendation of the Foreign Affairs and Constitutional Committee.¹¹

Before ratifying the Convention, the *Norwegian* Government considered

⁸ Cf. *Peter Christensen: Den Europæiske Menneskerettighedskonvention og dansk ret*, [The European Convention of Human Rights and Danish Law], in Edward Andersson (ed.): *Festskrift til Curt Olsson 70 år*, Helsinki (1989), pp. 31 ff., at p. 32.

⁹ *Ibid.*, at p. 31.

¹⁰ [Det siger lidt om den betydning, som man ved grundlovsændringen i 1953 tillagde den samtidige Europæiske Menneskerettighedskonvention og den af FN i 1948 vedtagne Verdenserklæring om Menneskerettigheder, at ingen af disse tekster kom til at øve nogen indflydelse på den nye grundlovs beskrivelse af borgernes rettigheder. Skønt de internationale tekster tilsammen indeholder flere grundlæggende rettigheder end de tidligere danske grundlove og desuden er langt udførligere i deres beskrivelse af rettighederne, blev der ikke i den nye grundlov rørt ret meget ved den nedarvede ordlyd, som i mere end hundrede år til almindelig tilfredshed havde været det skriftlige grundlag for danskernes frihedsrettigheder.]

¹¹ See *Stortinget*, 1951, St. prp. nr. 83, Innst. S. nr. 289, pp. 538 ff., and 5. des.-Tiltr. av Europarådets konvensjon om menneskerettighetene, pp. 2515 ff.

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that Article 2 of the Constitution, which prohibited the activity of Jesuits on *Norwegian* soil, was incompatible with Article 9 of the Convention and a reservation was made in this respect. The Constitution was subsequently amended and this reservation was withdrawn.¹² Apart from this provision of the Constitution, *Norwegian* law was, in the Government's view, considered compatible with the Convention.

However, one member of the Foreign Affairs and Constitutional Committee posed the question whether Article 32 of the Convention, stipulating the competence of the Committee of Ministers, was compatible with Article 1 of the *Norwegian* Constitution which lays down that "... the Kingdom of *Norway* is a free, independent, indivisible and inalienable realm".

The Department of Foreign Affairs had asked for an expert opinion from Professor *Frede Castberg* who, in a memorandum of 26 October 1950, stated that, in his opinion, it would be compatible with Article 1 of the *Norwegian* Constitution to undertake such obligations as laid down in Article 32 of the Convention. On the other hand, *Castberg* did not find the provisions in this article appropriate, since pure legal decisions would be taken by the Committee of Ministers for political or diplomatic, rather than legal, motives, and he recommended that the *Norwegian* Government should try to get the text of the Convention modified in this respect.¹³

The above-mentioned member of the Foreign Affairs and Constitutional Committee proposed within the *Storting* that a reservation be made as to Article 32 of the Convention, but this was rejected by the *Storting*.¹⁴

Apart from the discussion of the relationship between Article 32 of the Convention and Article 1 of the *Norwegian* Constitution, no further questions as to the compatibility of *Norwegian* law with the Convention were posed. It seems quite clear that the Government and the *Storting* considered *Norwegian* law to be compatible with the Convention. As in *Denmark*, the *Storting's* consent seems to have been given on the presupposition that *Norwegian* law was compatible with the Convention.

3.3. Sweden.

Sweden signed the European Convention of Human Rights on 28 November 1950. The Convention was ratified on 4 February 1952.

Chapter 10, section 2, of the present *Swedish* Instrument of Government

¹² Cf. 1 Yearbook, (1955-57), pp. 41 f.

¹³ See *Stortinget* 1951, St. prp. nr. 83, p. 4.

¹⁴ *Ibid.*, 1951. 5. des.- Tiltr. av Europarådets konvensjon om menneskerettighetene, pp. 2526 ff.

Norway

(see *supra* section 2.1) lays down that the consent of the *Riksdag*, *inter alia*, is required when the Government concludes any agreement which presupposes an amendment or abrogation of any law, or if the agreement is of major importance. Under Chapter 12, section 1, of the former *Swedish Instrument of Government* of 1809 international agreements which dealt with matters requiring the concurrence of the *Riksdag* or which were of major importance should "... contain a reservation making their validity dependent upon the sanction of the *Riksdag*". In accordance with this provision the *Riksdag* approved the ratification of the Convention on 9 May 1951.¹⁵

Prior to the ratification of the Convention the *Swedish* Government reviewed the compatibility of *Swedish* law with the Convention. This review showed that, in the Government's view, *Swedish* law was compatible with the Convention, although a statute laying down some restrictions on religious freedom was amended. The review, as it appears in the explanatory memorandum on the proposal for obtaining the consent of the *Riksdag*,¹⁶ was of a rather summary character and no closer comparative analysis was attempted.¹⁷ Viewed retrospectively, it is of particular interest to observe that, as pointed out by *Hans Danelius*,¹⁸ only *one sentence* in the explanatory memorandum was devoted to Article 6 of the Convention which subsequently created serious and well-known problems for *Sweden* (see *infra* section 18.3). Thus it was laconically stated: "The provisions in Article 6 on legal guarantees are completely covered by the Code of Procedure."¹⁹²⁰

However, *Nils Herlitz*, a prominent professor of public law and a member of the *Riksdag*, submitted a motion to the Committee on Foreign Relations,

¹⁵ See *Riksdagen* 1951, Proposition: 165; Motioner i Första Kammaren: 459; Utrikesutskottets utlåtande nr. 11, i anledning av dels Kungl. Maj:ts proposition nr. 165 om godkännande av Sveriges anslutning till Europarådets konvention angående skydd för de mänskliga rättigheterna och de grundläggande friheterna, dels ock i ämnet väckt motion I: 459; Första Kammararens Protokoll, Vol. A 2, nr. 13-18, pp. 18 ff.

¹⁶ *Ibid.*, Proposition: 165.

¹⁷ Cf. *Hans Danelius*: *De mänskliga rättigheter - räcker 2 kap. RF eller behövs mer?*, [The Human Rights - does Chapter 2 of the Instrument of Government Suffice or is more needed?], *SvJT* 1987, pp. 645, at p. 647; and *Sztucki* (1986), pp. 221 f.

¹⁸ Cf. *Hans Danelius*: *Europadomstolen och den svenska rättsordningen*, [The European Court and the Swedish Legal Order], *SvJT* 1989, pp. 653 ff., at p. 654.

¹⁹ Cf. *Riksdagen* 1951, Proposition: 165, p. 12.

²⁰ [Bestämmelserne i art. 6 om rättegångsgarantierna äro i full utsträckning täckta av rättegångsbalken.]

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which represented both Houses of which the *Riksdag* was then composed, in which the Committee was called on to pay special attention to the compatibility of *Swedish* law with the Convention as regards (1) the concept of "law" in *Swedish* constitutional law and in the Convention respectively, because some acts of government were regarded as "law" in the Instrument of Government (Article 89), (2) the possibility of judicial review of the legality of detention²¹ and (3) whether under *Swedish* law an "effective remedy" could be initiated before a national authority for persons whose rights had been violated in accordance with Article 13 of the Convention (see *infra* sections 18.1 and 18.2).²² Accordingly, he requested that the Committee, and subsequently the *Riksdag*, should consider the problem and make a declaration on the desirability of developing *Swedish* law to make it conform more closely with common European ideals.

The Committee on Foreign Relations (in the presence of 7 members out of a total of 32) considered the motion, but did not adopt it and recommended that the *Riksdag* approved the ratification of the Convention without any reservations.

It is probably fair to conclude that the *Riksdag* also considered domestic law to be compatible with the Convention. The questions posed in connection with the approval of the ratification of the Convention were, however, very fundamental, and one may doubt that the *Riksdag* in this respect was able to foresee the implications of the questions posed by *Nils Herlitz*. This was probably acknowledged by *Herlitz* himself in his final remarks during the proceedings in the *Riksdag*: "Nevertheless - that is what I wanted to emphasize - via the circumstances' [normative] power, the Convention will be a forceful and valuable support for the development of *Swedish* law, provided that it is taken seriously..."^{23,24}

²¹ That there could be problems in this respect had already been indicated in the above-mentioned explanatory memorandum. The Government's assumption that the institution of *Justitieombudsmanden* [now *Riksdagens Ombudsmän*] was an "effective remedy" within the meaning of Article 13 of the Convention was questionable from the outset and was later repudiated by the European Commission in Application No. 3893/68 (see *infra* section 17.2.5).

²² See *Riksdagen* 1951, Motioner i Första Kammaren: 459.

²³ [Konventionen kommer ändå - det är vad jag har velat betona - att genom omständigheternas makt, förutsatt att vi ta den på allvar, bli ett kraftigt och värdefullt stöd för den svenska rättens utveckling...]

²⁴ See *Riksdagen* 1951, Första Kammarrens Protokoll, Vol A 2, nr. 13-18, p. 22.

Concluding Remarks

3.4. Concluding Remarks.

It is somewhat surprising how little debate there was in the *Scandinavian* Parliaments when they had to approve the ratification of the Convention; the Convention established a review system which, though facultative for the signatories of the Convention, was an innovation in the post-war period. The fact that the ratification implied that the *Scandinavian* countries should recognize the competence of the Commission to receive individual petitions (*Denmark* and *Sweden* accepted the Commission's competence to receive individual petitions already in connection with the ratification of the Convention), *i.e.* to some extent accept a limitation on national sovereignty, does not make this lack of debate less surprising. The only reasonable explanation to this is that the *Scandinavian* Parliaments considered it beyond any doubt that the national jurisdictions more than fulfilled the requirements of the Convention;²⁵ they probably even believed that other European countries would have to learn from the *Scandinavian* countries.²⁶

Since a general incorporation was not considered necessary, the Convention can thus be said to have been subject to *passive incorporation*. It may be said that this was a "laissez-faire" way of "incorporating" it into domestic law. However, it happens quite frequently (see *infra* chapter 4) that domestic legislation is amended in order to fulfil the obligations under the Convention; such amendments to existing legislation may be considered as *partial* incorporations of the Convention. Moreover, it should be noted that principles and rules similar to the provisions of the Convention were to a large extent already in force by virtue of the national Constitutions, of express statutory provisions and of general principles of law. As regards provisions of the Convention where this was not considered to be the case, special legislation was passed or a reservation was made.

This does not mean, of course, that the Convention did not make a legal impact on the *Scandinavian* countries. It served, and still serves, as a basis, binding upon each country under international law, for a corresponding set of domestic rules of law. Thus the responsibility of the day-to-day fulfilment of the Convention lies primarily with the Legislature, although the law-en-

²⁵ Cf. Eva Smith: *Menneskerettighedskonventionerne og de nordiske retsplejeordninger*, [The Human Rights Conventions and the Nordic Systems of Administration of Justice], The Proceedings of the 32nd Nordic Meeting of Lawyers, Reykjavík (1990), Vol. 1, pp. 11 ff., at p. 13.

²⁶ See Hans Danelius, *op.cit.*, p. 654.

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forcing authorities also have a major responsibility in this respect.

PART II

The Impact of the European Convention on Scandinavian Legislation

CHAPTER 4

The Impact of the European Convention on Scandinavian Legislation

4.1. Introduction.

As pointed out in sections 2.1 and 3.4, a consequence of the "dualist" approach to international law is that the implementation of the obligations under the Convention is primarily the responsibility of the Legislature. It is for the Legislature to make sure that domestic legislation constantly meets the requirements of the Convention. This is particularly important with regard to human rights conventions; it also, however, implicates a series of concrete difficulties. This is due to the fact that those domestic rules which form the basis of the fulfilment of the Convention are not codified in one legal instrument only. They are to be found in the national Constitutions, in ordinary legislation, in sub-legislation, in unwritten general principles of law or they follow from legal practice. Moreover, the said statutory rules are spread over different areas of legislation and under the competence of different ministries.¹

This would suggest that the day-to-day fulfilment of the Convention is a very complicated task. This is not the case, however. Since domestic rules similar to those of the Convention are applicable in domestic *Scandinavian* law to a very large extent, it is often, as pointed out by Dr. *Niels Eilschou Holm*, unnecessary to carry out individual and specific studies of these relations: considerations on the relationship between the Convention and domestic statutes and principles which are central are sufficient.² This is illustrated clearly by the fact that in a recent *Danish* handbook on the framing of statutes, the relationship to the Convention was not indicated as any one of the possible substantial barriers of which the Legislature should be aware when passing legislation.³

¹ See Danelius (1984), pp. 57 f.

² Cf. Eilschou Holm (1981), p. 122.

³ Cf. John Vogter & Hanrik Dahl Sørensen: *Indholdsmæssige krav til lovgivningen*, [Substantial Requirements to the Legislation] in W.E. von Eyben (ed.): *Juridisk grundbog*, 4th edition, Copenhagen (1989), Vol. 2, pp. 43 ff., at p. 49.

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As a result, however, the study of the impact of the Convention on domestic *Scandinavian* legislation is in general affected by difficulties typical of those mentioned in the first paragraph. This may explain why no systematic studies on the impact of the Convention on either domestic *Danish*, *Norwegian* or *Swedish* legislation have been made so far. In fact it is remarkable how little attention the Legislature's attempts to fulfil the Convention by passing new or amending existing legislation has received in legal writings in comparison to that given to the courts' application of the Convention.

In spite of constant efforts to ensure that domestic *Scandinavian* law is compatible with the Convention, it happens that in individual applications the European Commission and Court find a domestic *Scandinavian* provision either in itself or the way in which it has been applied in the case at issue is in breach of the Convention. In such cases the country in question is, under the Convention, obliged to see to it that its domestic legislation is amended in order to meet the requirements of the Convention. As will be seen in the following sections, it is clear that in such situations the *Scandinavian* Legislatures feel obliged to bring domestic legislation into line with the Convention.

In this chapter, an overall survey of the impact of the Convention on *Scandinavian* legislation is made. It should be underlined that the chapter contains *only a survey* of the most illustrative examples of considerations as to how domestic law should be enacted in order to comply with the Convention. However, the material studied should suffice to draw some general conclusions.⁴ A basic distinction is made between the impact of the Convention in general and the impact of specific decisions from the European Commission and Courts, the former being discussed in section 4.2 and the latter in section 4.3. Finally, in section 4.3 some conclusions are drawn.

⁴ The study is, although it includes other kinds of material also, in principle only based on an examination of official *Scandinavian* parliamentary reports of cases which have been indexed under "human rights", "the European Convention on Human Rights", "the Council of Europe" or "international law" in the period from 1970 - 1988. Moreover, the public inquiries of the states of the same period have also been examined.

Due to insufficient registration of the questions relating to human rights, it may be assumed that not all the examples of cases in which the Convention has been discussed or has had a specific impact on the enactment of legislation are included in the study.

It should also be noted that the Convention is probably frequently considered in Ministries in relation to the preparation of legislation without the question, for one reason or another, being expressly raised in the official written material subsequently submitted to Parliament. No attempt has been made to study this kind of material.

The Impact of the European Convention in General

4.2. The Impact of the European Convention in General.

It is important to keep in mind the legislative process in *Scandinavia* when discussing the impact of the Convention on domestic legislation. Within the administration of justice the normal procedure for initiating the work on a new statute or an amendment to an existing statute is to appoint a commission or committee of experts to which the Minister in question gives more or less detailed terms of reference. This applies, generally speaking, irrespectively of whether the initiative has come from the Government, a private member of Parliament or a third party who has drawn the attention of the Government to a problem calling for action. Since the legal expertise is normally in majority in such committees, it is normally at this stage of the legislative procedure that the more complicated technical legal questions are elucidated. This applies also, as will be seen, to the question of the relationship between either existing or proposed statutory provisions and the Convention. Unless the question of the relationship with the Convention is likely to have further political implications, or the Bill is specifically aimed at redressing a divergence between domestic law and the Convention, it is normal that the Committee's considerations to this effect be discussed no further in Parliament.

The report of the Committee is submitted to the Minister concerned and usually published. Either the report of the Committee or the draft Bill which is subsequently drawn up within the Ministry itself is sent to a number of different public and private bodies which are invited to comment on the report or the draft Bill. On the basis of the comments received the final Bill is drafted. In *Sweden* the Bill may then be sent to the Council of Legislation [*Lagrådet*] which gives a reasoned opinion if it concerns matters where problems of legislative technique, constitutional questions or questions of interpretation are predominant. Then the Bill is introduced in Parliament. Of particular interest for the subsequent interpretation of the passed Bill is the committee stage where a standing committee examines the Bill and submits a report to the House.⁵

In this section some examples of the impact of the Convention in general, *i.e.* not cases where a decision of the Commission and Court is implemented

⁵ On the legislative process in *Scandinavia*, see, example, Stig Strömholm: *Introduction* in Stig Strömholm (ed.): *An Introduction to Swedish Law*, 2nd edition, Stockholm (1988), pp. 21 ff., at pp. 35 ff.; and John Vogter: *Lovgivningsproceduren*, [The Legislative Procedure], in W.E. von Eyben, op.cit., pp. 91 ff.

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in domestic law, are discussed. A distinction is made between cases in which the considerations of the relationship is only contained in the report of an expert committee, and cases where such considerations also appear in the explanatory memorandum accompanying the Bill or at later stages in the legislative procedure.

4.2.1. Considerations of Committees of Experts.

As mentioned, the forum in which discussions of the relationship between the present state of domestic law and the Convention take place is usually in the reports of committees of experts appointed to consider and propose amendments of existing law. Such considerations and discussions take many forms but they all show that the Committee has been aware of the requirements of the Convention. However, as will be seen, it may from time to time be questioned whether the considerations of the Committee in this respect are sufficiently profound.⁶ Moreover, it can by no means be claimed that the Committee will necessarily draw consequences from its outline of the requirements of the Convention. Frequently, the question of the compatibility of a proposed amendment with the Convention is not subjected to further discussion in the Parliaments other than the one which has already taken place in the Committee of Experts.

When the new *Danish Aliens Act* was enacted in 1983 the relationship to, *inter alia*, the Convention was considered by the committee of experts who had been requested to submit a draft Bill on the matter to the Ministry of Justice.⁷

The Committee considered that already under the present legislation the provisions in Article 3 and 8 of the Convention were - in relation to allowing aliens into the country as well as their expulsion from it - normative for the police and the Ministry of Justice when exercising their discretionary powers in pursuance with the Act (see *infra* chapter 9).⁸ Furthermore, a minority of the Committee proposed to draft the provision on family reunification in the Bill in accordance with the practice of the European Commission and Court

⁶ As regards *Danish law*, Rehof & Trier (1990), p. 100, note 109, observe that considerations about the relationship between the Convention and domestic law in expert committees seem to be increasing, but that it has not yet reached a satisfactory level.

⁷ See *Betænkning nr. 968/1982 om udlændingelovgivningen*, [Report No. 968/1982 on the Aliens Legislation].

⁸ *Ibid.*, at pp. 30 f. and 43 f.

Considerations of Committees of Experts

on the application of Article 8 of the Convention in relation to aliens, whereas the majority, though concurring on the merits, wanted to empower the Minister of Justice to issue such rules.⁹ The minority's proposal was, with some minor changes, finally embodied in section 9 of the new Aliens Act (Act No. 226 of 8 June 1983).

Moreover, it was stated clearly that under Article 63 of the Constitution, the courts are considered to be entitled to monitor that under the exercise of their discretionary powers the administrative authorities had not violated *Denmark's* obligations under international human rights conventions.¹⁰ This was considered "an effective remedy before a national authority" within the meaning of Article 13 of the Convention and no change in this system was proposed by the majority of the Committee.¹¹ However, the Committee was aware of the fact that in cases concerning the expulsion of aliens the Commission had held that Article 63 was not a "domestic remedy" within the meaning of Article 26 of the Convention which remedy needed to be exhausted before the Commission could declare an application admissible (see *infra* section 17.2.1).¹² A minority of the Committee considered it "... unfortunate that the mentioned international organs under the present legal position may take decisions concerning a here-living person's fundamental rights without *Danish* courts having had the possibility to influence the decision."¹³ Accordingly, these members of the Committee proposed a more intensive judicial review with suspensive effect regarding the enforceability of administrative decisions.¹⁵

When the Bill was discussed in the *Folketing*,¹⁶ its relationship to the

⁹ *Ibid.*, at p. 31.

¹⁰ *Ibid.*, at p. 81.

¹¹ *Ibid.*, at pp. 67 f.

¹² *Ibid.*

¹³ *Ibid.*, at p. 86.

¹⁴ [... uheldigt, at de nævnte internationale organer under den nuværende retstilstand kan træffe afgørelse vedrørende herboende personers fundamentale rettigheder, uden at danske domstole har haft mulighed for at øve indlydelse på afgørelse.]

¹⁵ *Ibid.*, at pp. 110 ff.

¹⁶ See FT 1982-83, *Forhandlingerne*, cols. 4502 ff., 5316 ff., 12152 ff., 12587 ff. and 12847; *Tillæg A*, cols. 2027; *Tillæg B*, cols. 1935 ff., 2775 ff. and 2845 ff.; and *Tillæg C*, cols. 609 ff.

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Convention and other international instruments does not seem to have played any important role. But there can be no doubt that the Act which was eventually passed fulfilled the requirements of the Convention.¹⁷

In 1983 a *Norwegian* committee of experts submitted a report¹⁸ containing a draft Bill for a new Act on Aliens to the Ministry of Justice. The report contained a survey on *Norway's* international obligations in relation to the treatment of aliens in the widest sense.¹⁹ The requirements of the relevant Articles of Convention and the practice of the European Commission and Court in this respect were outlined.²⁰

Of particular interest is that the Committee also considered what consequences *Norway's* international obligations should have for the drafting of the Bill. First, it was emphasized that no systematic examination of the consequences on domestic law of the international obligations had been carried out. However, in comparison with the other Committee reports examined in this chapter, the survey in the this report regarding international obligations and the possible consequences of these for the question at issue is of a considerably higher standard. Moreover, it was also pointed out that unintended doubts or unpredicted divergences arising from the international obligations may come up in the domestic application of law. Accordingly, the survey of international obligations and their consequences for domestic law did not aim at preventing such unintended effects. But the purpose of the survey was to raise the Legislature's consciousness on this point.²¹

As regards the draft Bill, the Committee stated that it had "... assessed each kind of obligation from point to point to see which was the most appropriate way"²² of framing its proposals, aiming to state these in such a way that they be compatible with *Norway's* international obligations.

¹⁷ Cf. Peter Christensen: *Den Europæiske Menneskerettighedskonvention og dansk ret*, [The European Convention on Human Rights and Danish Law], in Edward Andersson (ed.): *Festskrift för Curt Olsson 70 år*, Helsinki (1989), pp. 31 ff., at p. 33.

¹⁸ See NOU 1983:47 *Ny Fremmedlov*, [NOU 1983:47 New Aliens Act].

¹⁹ *Ibid.*, at pp. 115 ff.

²⁰ *Ibid.*, at pp. 134 ff.

²¹ *Ibid.*, at p. 139.

²² *Ibid.*, at p. 140.

²³ [... såvidt muligt vurderet fra punkt til punkt for de enkelte slags forpligtelser hvilken måde som er mest hensigtsmæssig.]

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Accordingly, the international obligations had been incorporated in the following ways: (1) reformulated directly in the draft Bill; (2) the administration had been empowered to issue regulations incorporating the obligations into domestic law; (3) an attempt was made to specify the legal position deriving from international obligations; (4) to provide a better legal position than that required under international obligations; or (5) - which is of particular interest in this respect - by proposing a general clause according to which the Act should be applied in accordance with international obligations aiming at improving the legal position of aliens in domestic law.²⁴

The general clause was included in the Bill which the Ministry of Justice subsequently introduced in the *Storting*.²⁵ In the explanatory memorandum accompanying the Bill it was explained that

"[t]he provision implies that international rules binding upon *Norway*, and which aim at strengthening the position of aliens, shall be applied

- to interpretation and complementation of the Act,
- as substitution of, or with trenchancy towards, legislative provisions in the opposite direction,
- as binding for discretionary decisions pursuant to the Act."^{26,27}

It was further stressed that the provision did not mean that rules of international law which did not aim at strengthening the legal position of aliens could not be applied at all; to those rules the normal principles governing the relationship between international law and domestic *Norwegian* law would be applicable.²⁸ The draft provision did not give rise to any debate in the Committee of Justice; but it was noted that to the extent *Norway* was bound by international obligations, the power of the Legislature was limited in accordance with these obligations.²⁹

²⁴ Ibid.

²⁵ Cf. *Stortinget* 1986-87, Ot.prp. nr. 46, pp. 46 and 189.

²⁶ Ibid., at p. 190.

²⁷ [Bestemmelsen innebærer at internasjonale regler Norge er bundet av og som har til formål å styrke utlendingens stilling, skal anvendes

- til tolkning og utfylling av loven,
- til erstatning for, eller med gjennomslagskraft overfor, lovbestemmelser i motsatt retning,
- som bindende for skjensmessige avgjørelser i henhold til loven.]

²⁸ Ibid.

²⁹ Cf. *Stortinget* 1987-88, Innst. O. nr. 92, pp. 4 and 6.

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On the 19 January 1984 the European Commission declared admissible Application No. 9330/81.³⁰ The application concerned alleged violations of Articles 3, 8 and 13 of the Convention in a case of the expulsion of an adolescent. A friendly settlement was subsequently reached. In the settlement it was, *inter alia*, stipulated:

"As regards the question of a remedy on the enforcement stage of an expulsion order, the Government have appointed a Commissioner to deal with this matter. The directives to the Commissioner, issued by the Government on 18 October 1984 (Dir. 1984:39), state that the Commissioner shall analyse closely such demands for changes of the regulations which may follow from the European Convention on Human Rights or which may otherwise be called for. In this context he should have regard to such regulations as may exist in other States which are parties to the Convention. Furthermore, he is to propose such new rules for which the analysis may give cause. The proposals should be presented during the year of 1985.

The Government will then, on the basis of the investigations made and if possible before the end of 1985, propose such amendments of the rules concerning the enforcement of expulsion orders that make these provisions fully comply with Article 13 of the Convention."³¹

In a *Danish* report on coercive measures in psychiatry, reference was made to the Committee of Ministers' Recommendation No. R (83) 2 of 22 February 1983 concerning the Legal Protection of Persons suffering from Mental Disorder placed as Involuntary Patients.³² Furthermore, reference was made to the decision of the European Court in *X. v. the United Kingdom* in which the Court held that judicial review as limited as that available in the habeas corpus procedure in the applicant's case, while adequate for emergency measures for the detention of people on the ground of unsoundness of mind, was not sufficient for a continuing confinement such as the one undergone by the applicant.³³ The Committee then stated that "[i]n this decision there lies a precondition that Article 5 of the European Convention on Human Rights makes certain demands on the scope and the intensity of the review the courts shall make when deprivation of liberty is at issue. It is important to be aware of this requirement when the revision is

³⁰ Cf. 35 D.R., pp. 57 ff.

³¹ Cf. 39 D.R., pp. 75 ff., at p. 79.

³² Cf. *Principbetænkning nr. 1068/1986 om tvang i psykiatrien*, [Report of Principle No. 1068/1986 on Coercive Measures in the Psychiatry], pp. 140 ff.

³³ Cf. Eur. Court H.R., *Case of X v. the United Kingdom*, Series A, Vol. 46 (1982), para. 59.

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going on."³⁴³⁵

The same international instruments as well as Articles 7 and 10 of the UN-Covenant were discussed by a *Norwegian* committee of experts considering similar questions.³⁶ The Committee found that *Norwegian* law clearly fulfils the requirements of the said international obligations, but one of the reasons why the international human rights were included in the recommendation to the Legislature was the wish to introduce them in a *Norwegian* context.³⁷

In a similar *Swedish* report³⁸ there seems not to be any discussion of the requirements of the Convention in relation to compulsory commitments to psychiatric hospitals. However, the proposals of the Committee - such as definite rules concerning the maximum duration of compulsory care, judicial review of the medical decision to commit a patient to compulsory treatment in a psychiatric hospital as well as the decision to prolong such treatment³⁹ - was, in effect, very much aimed at meeting the requirements of Article 5(4) of the Convention.⁴⁰

The compatibility of Article 3 of the Convention of solitary confinement, to which detainees on remand may be subjected by a court order in *Denmark*, has been questioned on different occasions. In a report of a committee of experts who considered the question, it was rejected that *Danish* law and practice were at variance with the requirements of Article 3 of the Convention.⁴¹ This view was based in part on the general practice of the European

³⁴ Cf. Principbetænkning nr. 1068/1986, op.cit., p. 141.

³⁵ [I denne forbindelse ligger der en forudsætning om, at art. 5 i den europæiske menneskerettighedskonvention stiller visse krav til omfanget af og intensiteten i den efterprøvelse, domstolene skal foretage, når der er tale om frihedsberøvelse. Det er vigtigt at være opmærksom på dette krav ved den igangværende revision.]

³⁶ See *NOU 1988:8 Lov om psykisk helsevern uten eget samtykke*, [NOU 1988:8 the Mental Ill Persons Act], pp. 94 ff.

³⁷ *Ibid.*, at p. 98.

³⁸ See *SOU:1984:64 Psykiatin, tvånget och rättssäkerheten*, [The Psychiatry, the Compulsion and the Rule of Law].

³⁹ *Ibid.*, at pp. 472 ff. (the Summary in English).

⁴⁰ For further information of the Commission's and Court's practice concerning Article 5(4) of the Convention in relation psychiatric detention, see Fawcett (1987), pp 120 f.

⁴¹ Cf. *Betænkning nr. 975/1983 om isolation af varetagtsarrestanter*, [Report No. 975/1973 on Isolation of Detainees on Remand], pp. 35 and 106 ff.

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Commission on solitary confinement and in particular on the Commission's decision in Application No. 8395/78.⁴² In this case, the Commission held that the fact that the applicant had been isolated for 425 days when remanded in custody did not amount to a violation of Article 3 of the Convention. The Commission specifically noted that the cell "... bearing close resemblance to the accommodation provided in students' halls of residence", as well as the fact that throughout the period of isolation the applicant was allowed to exercise in the open air for one hour every day, had the loan of books from the prison library, had personal contact with the staff 8-10 times daily, was seen by a doctor, had contact with his counsel without any restrictions and was allowed to receive controlled visits by his children.⁴³

A report of a *Swedish* committee considering the anti-terrorist legislation contains an in-depth analysis of the interpretation of the Convention and its Protocols and the relationship between these instruments and domestic law.⁴⁴ The analysis of the requirements of the Convention and their possible impact on domestic law is probably the most profound so far in a report from a committee of experts in *Scandinavia*. Two questions in particular were discussed:

First, whether restrictions on the right to move within the Realm, to which aliens suspected of terrorist activity under the anti-terrorist legislation could be subjected, amounted to "deprivation of liberty" within the meaning of Article 5 of the Convention. It was noted that *Högsta Domstolen* in NJA 1989.121 (see *infra* section 8.3) had interpreted Article 5 in such a way that the said restrictions could not be considered as "deprivation of liberty" within the meaning of this provision. Moreover, it was noted that in Application No. 13344/87, the European Commission with reference to the *Guzzardi Case* decided by the European Court⁴⁵ had found that restrictions imposed under the anti-terrorist legislation was not "deprivation of liberty". In this case, the Government had decided to expel the applicant but the expulsion was, due to the risk of political persecution in his own country, suspended on the condition that the applicant stay in the two municipalities of Helsingborg and

⁴² Cf. 27 D.R., pp. 50 ff.

⁴³ *Ibid.*, at p. 53.

⁴⁴ Cf. *SOU 1989:104 Terroristlagstifningen* [SOU 1989:104 The Anti-Terrorist Legislation], pp. 115 ff.

⁴⁵ Cf. Eur. Court H.R., *Guzzardi Case*, Series A, Vol. 39 (1981).

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Malmö, and that he should report to the police three times a week.

It was then considered whether the imposition of such restrictions for very long periods would amount to a "deprivation of liberty" and thus infringe upon Article 5 of the Convention. The Committee considered it very unlikely that the Strasbourg organs would reach such a result. In particular, it was emphasized that "[t]he Convention, it is true, is now being interpreted more and more extensively, but this would involve an analogous interpretation; something which does not seem to have appeared in the practice of the European Court. Nor does any indication exist in the Commission's decision of 1989 that one should establish such a way of looking at things."⁴⁶

Second, it was considered whether the fact that the decision of the Government could not be appealed against was compatible with Article 13 of the Convention, which requires that an "effective remedy before a national authority" is available to everyone whose rights and freedoms as set forth in the Convention have been violated. Again reference was made to the Commission's decision in Application No. 13344/87 in which the Commission held, after having found the other complaints manifestly ill-founded, that neither was this complaint substantiated, since the right to an effective domestic remedy presupposes "an arguable claim". On this basis the Committee concluded that insofar as the anti-terrorist legislation was applied properly, there would be no problem in relation to Article 13. However, if this legislation was applied so extensively that it touched upon the individual's rights in a strict sense, the Committee would not exclude the possibility of an violation of Article 13.⁴⁸

Altogether the Committee concluded that the *Swedish* anti-terrorist legislation, if applied correctly, met the requirements of the Convention.⁴⁹

A committee set up to consider some questions of criminal law proposed to include in the Penal Code a provision which would expressly prohibit

⁴⁶ Cf. SOU 1989:104, p. 127.

⁴⁷ [Konventionene har visserligen kommit att tolkas mer och mer extensivt, men detta skulle innebära en analogisk tillämpning, något som inte synes ha förekommit i Europadomstolens praxis. Det finns inte heller någon som helst antydning i kommissionens avgörande från år 1989 om att man skulle kunna anlägga ett dylikt betraktelsesätt.]

⁴⁸ Ibid., at p. 137.

⁴⁹ Ibid., at pp. 143 f.

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analogous interpretations in criminal law.⁵⁰ The Committee was of the opinion that this state of law was already implicit in Chapter 10, section 2, of the Instrument of Government,⁵¹ but since *Högsta Domstolen* did not share this view, the Committee proposed to codify it explicitly in the Penal Code. The Committee noted in particular that the prohibition of analogous interpretation in criminal law could be deduced from Article 7 of the Convention as interpreted by the European Commission in, for example, Applications Nos. 6683/74, 7721/76 and 8141/78.⁵² Similarly, in a *Norwegian* report by a Royal Commission the requirements and the scope of the *principle of legality* in criminal law was considered. Contrary to the *Swedish* Committee, the *Norwegian* Committee did not find that Article 7 of the Convention required that sentences be founded in statutory law.⁵³ Moreover, the Commission mentioned briefly that the question had been raised whether the present provisions of the Penal Code relating to security measures were in breach of Article 5(4) of the Convention. However, the report simply referred to this question and did not contain any study or comments relating to this article.⁵⁴

Article 5(5) of the Convention stipulates that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." The scope of this provision was discussed by a *Danish* expert committee considering an amendment of the rules on compensation for criminal persecution of the Administration of Justice Act.⁵⁵

4.2.2. Amendments of the Existing Legislation.

As already mentioned, it is not very common to find examples of con-

⁵⁰ Cf. *SOU 1988:7 Frihet från ansvar - om legalitetsprincipen och om allmänna grunder för ansvarsfrihet*, [Exclusion from Responsibility: on the Principle of Legality and on General Grounds for Exclusion of Responsibility], p. 51.

⁵¹ *Ibid.*, at p. 45.

⁵² *Ibid.*, at p. 49.

⁵³ Cf. *NOU 1988:57 Straffelovgivningen under omformning*, [The Penal Legislation under Conversion], p. 115.

⁵⁴ *Ibid.*, at p. 199. See also Application No. 11701/85 (*Case of E v. Norway*), report of the Commission, decision on the admissibility, p. 61.

⁵⁵ Cf. *Betänkning nr. 801/1977 om erstatning i anledning af strafferetlig forfølgning*, [Report No. 801/1977 on Compensation in Consequence of Criminal Persecution], pp. 22 f.

Amendments of the Existing Legislation

siderations on the relationship between domestic law and the Convention in general in explanatory memorandums or at subsequent stages of the legislative procedure. However, a few examples might be mentioned:

In Application No. 11219/84⁵⁶ the applicant complained about the *Hejesteret's* judgment in UfR 1984.81⁵⁷ in which the majority of the Court, *inter alia*, held that, "... if the circumstances give reason to believe that the making of statements in such cases involve an obvious risk that the witness or persons closely related to him would suffer any harm, regard to the witness may allow that the identity is kept secret from the accused, if respect for the public interest in view of the seriousness of the case and the importance of the statement quite exceptionally would require that the statement is made."⁵⁸ Allowing such anonymous witnesses in the trial was, in the applicant's view, contrary to Article 6(3)(d) of the Convention. Since, "... when the applicant was ordered to leave the courtroom, his defence counsel remained in the room and had every opportunity, in accordance with Article 6 para. 3 (d) to examine the two witnesses in question", as well as "... the interests of the defence could be safeguarded just as well by the lawyer as by the applicant himself", the Commission concluded that the requirements of Article 6(3)(d) were met and the application was thus manifestly ill-founded.⁵⁹

As a consequence of the above-mentioned private Bill, the Minister of Justice asked the Permanent Advisory Council on the Administration of Justice to consider the matter. In its report,⁶⁰ the majority of the Council proposed an amendment to the Administration of Justice Act according to

⁵⁶ Cf. 42 D.R., pp. 287 ff.

⁵⁷ *Scandinavian* cases are not cited by reference to the names of the party or the parties, but to the publication where the case is reported and the year of publication. The more important cases in *Denmark* are reported in *UfR*, in *Norway* in *NRI*, and in *Sweden* in *NJA*, as regards cases from *Högsta Domstolen*, and in *RA*, as regards cases from *Regeringsrätten*.

⁵⁸ Here cited in English from 42 D.R., p. 289. This decision had given rise to the introduction of a private Bill containing a prohibition on the use of anonymous witnesses. In the explanatory memorandum accompanying the Bill it was explained that the decision appeared to be "*strikingly*" contrary to Article 6 of the Convention, cf. Folketinget 1984-85, Lovforslag nr L 102. However, in an extrajudicial comment on the decision in UfR 1984 B, pp. 289 ff., at p. 291, Justice Palle Kiil explained that the question of the compatibility of the use of anonymous witnesses with Article 6 of the Convention had been pleaded by the counsel for the defence. Since the counsel for the defence had the right to question the witnesses in question, the *Hejesteret* did not find that there was any divergence between domestic law and Article 6 of the Convention.

⁵⁹ Cf. 42 D.R., p. 292.

⁶⁰ See *Betænkning nr. 1056/1985 om anonyme vidner m.v.* [Report No. 1056/1985 *93* Anonymous Witnesses etc.].

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which the use of anonymous witnesses, under certain restricted circumstances, may be authorized. Since these circumstances were stricter than the ones set forth by the *Højesteret* in UfR 1984.81, the Council did not consider the relationship to Article 6 of the Convention any further. However, before the Council had submitted its report, a new private Bill to the effect that the use of anonymous witnesses should be completely prohibited was introduced. This Bill was finally passed as Act No. 321 of 4 June 1986 despite the recommendations submitted by the Permanent Advisory Council on the Administration of Justice.⁶¹

In the explanatory memorandum accompanying the Bill on the coming into force and amendment of the new *Norwegian Act of Criminal Procedure*, some considerations were made in relation to the requirements of the Convention. The Bill embodied, *inter alia*, proposals for new provisions governing detention on remand. One of the reasons on the basis of which detention on remand could be ordered was when there was specific reason to believe that the suspect would impede the investigation. It was noted that although this particular reason for the ordering of detention on remand was not explicitly recognized by Article 5(1)(c) of the Convention, it was nevertheless considered to be compatible with the Convention.⁶² As regards the possibility of ordering detention on remand out of respect for the public interest, the Ministry of Justice considered that such a possibility was neither contrary to the Committee of Ministers' resolutions of 9 April 1965 and 27 June 1980 nor incompatible with Article 5(1)(c) of the Convention. This view was based on the fact that in a number of other European countries also it is possible to remand suspects in custody out of respect for the public interest, as well as on the fact that the Recommendation of 27 June 1980 recognizes that detention on remand out of respect for the public interest "... may exceptionally be justified in certain cases of particularly serious offences"⁶³ (for similar *Danish* considerations, see *infra* section 4.3.2.A).

4.3. The Impact of Decisions of the European Commission and Court. It follows from the "dualist" attitude to international law that it is the task of

⁶¹ See FT 1985-86, *Forhandlingerne* cols. 730 f., 1959 ff., 11302 ff. and 11570; Tillæg A, cols. 1035 ff.; Tillæg B, cols. 1565.; and Tillæg C, cols. 737 f.

⁶² Cf. Stortinget 1983-84, Ot. prp. nr. 53, p. 26.

⁶³ *Ibid.*, at p. 33.

The Impact of Decisions of the European Commission and Court

the national Legislature to secure that domestic law conforms to undertaken international obligations. Moreover, Article 53 of the Convention obliges the Member States to abide by the decisions of the European Court in cases in which they are parties. In order to do so, it may frequently be necessary to pass new or amend existing legislation. However, no such obligation follows from the Article as regards cases directed against other states. Such decisions may nevertheless have a strong persuasive impact on the national Legislature.

4.3.1. Decisions in Cases to which the Scandinavian Countries have not been a Party.

It frequently happens that the reports of committees of experts contain considerations as to the impact of the Convention in general, and specific decisions of the Commission and Court in cases against other states (see *supra* section 4.2.1). It is more rare to find examples of cases in which a decision in a case directed against another Member State is the direct cause of introducing new legislation. There exists, however, one clear example of the passing of legislation on such a basis.

In the private *Danish* labour market closed shop agreements have traditionally been recognized as valid. The compatibility of this legal position in *Denmark* with Article 11 of the Convention became, as a consequence of the European Court's decision in the *British Rail Case*,⁶⁴ questionable. In this judgment it was laid down that Article 11 does not only protect the *positive* freedom of association (*i.e.* the right to associate), but also the *negative* freedom of association (*i.e.* the right not to be a member of an association (trade union) at all) in the sense that it is not compatible with the provision as such if, under domestic law, it is lawful to dismiss employees who refuse to become members of a trade union which subsequent to their employment has concluded a closed shop agreement with the employer. The judges from the Nordic countries dissented since, in their opinion, it was quite clear from the *travaux préparatoires* of Article 11 that it did not aim at protecting the *negative* freedom of association. However, it was also emphasized in the judgment that it did not take a stand on the question of whether or not closed shop agreements in general were compatible with Article 11 of the Convention.

The question of the validity of closed shop agreements in the *Danish*

⁶⁴ Cf. Eur. Court H.R., *Case of Young, James and Webster*, Series A, Vol. 44 (1981).

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labour market has over the years been a very sensitive one. It is generally assumed that closed shop agreements are not valid within the public labour market as they infringe upon the principle of equality which, although unwritten, is part of *Danish* administrative law. Similarly, in that part of the private labour market where the *Danish* Employers Association is a party to collective agreements, there exist no closed shop agreements. When the matter has been discussed in the *Folketing*, generally speaking, the right-wing parties have been against the existence of closed shop agreements, whereas such agreements have been supported by the Left.

Against this background it is quite interesting that the Social Democratic Government, which was in general in favour of closed shop agreements, on 28 January 1982 introduced a Bill on protection against dismissal on the grounds of association relations.⁶⁵ In the explanatory memorandum accompanying the Bill, it was stated that

"[i]t may thus be assumed that *Danish* law does not fully secure the aspects of the negative right of association which have been established by the Human Rights Court's judgment. The Government regards it as a matter of course that *Denmark* should observe its obligations *vis-à-vis* the Human Rights Convention. This is the background for the introduction of the present Bill."⁶⁶

On the other hand, as stressed by the Minister of Labour in his written introduction of the Bill, "... it should be underlined that with this proposal the Government does not change more in the applicable *Danish* legal position than the judgment delivered necessitates."⁶⁸ The Minister of Labour and other Social Democrats stated repeatedly during the first reading of the Bill that they were opposed in principle, but that *Denmark*, of course, should

⁶⁵ See FT 1981-82, *Forhandlingerne*, cols. 798 ff., 1423 ff., 7763 ff. and 8050 ff.; *Tillæg A*, cols. 1599; *Tillæg B*, cols. 853 ff.; and *Tillæg C*, cols. 497 f.

⁶⁶ Cf. FT 1981-82, *Tillæg A*, col. 1604.

⁶⁷ [Det må således antages, at dansk ret ikke fuldt ud sikrer de aspekter af den negative foreningsfrihed, som er fastslået ved Menneskerettighedsdomstolens dom. Regeringen betragter det som en selvfølge, at Danmark skal overholde sine forpligtelser efter Menneskerettighedskonventionen. Dette er baggrunden for fremsættelsen af nærværende lovforslag.]

⁶⁸ *Ibid.*, *Forhandlingerne*, col. 799.

⁶⁹ [... skal det understreges, at regeringen ikke med forslaget ændrer mere i den gældende danske retstilstand, end den afsagte dom nedvendiggør.]

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observe the judgment of the European Court.⁷⁰ Also the spokesmen of most of the other parties considered the Bill to be a "minimum solution" which did not go any further than what was required by the judgment of the European Court; but they did not dispute the fact that *Denmark* should fulfil its obligations under the Convention.

After much debate the Bill was, with only one change, passed as Act No. 285 of 9 June 1982 on Protection against Dismissal on the Grounds of Association Relations. It was subsequently questioned in legal writings whether the legal effects of an unlawful dismissal under the Act - damages corresponding to a maximum of 78 weeks salary, but no possibility of reinstatement - were in accordance with Article 11 of the Convention.⁷¹ The Act was, *inter alia*, applied in the well-known *HT Case* in UfR 1986.898 (see *infra* sections 5.2.1 and 6.2); a case subsequently brought before the European Commission which declared it inadmissible because the complainants could not be regarded as "victims" within the meaning of the Convention.⁷²

4.3.2. Decisions in Cases to which the Scandinavian Countries have been Parties.

When the *Scandinavian* countries have been found guilty of a violation of the Convention the question of how to bring domestic law into line with the Convention arises. It is only rarely brought into question that the State should do so, but the ways in which domestic law is to be changed in order to remedy the divergence with the Convention are frequently debated at length. This applies in particular when the decision of the Commission or Court touches upon a principle which is central to domestic law and which has hitherto been considered to be in accordance with the Convention. Moreover, it happens that the premises of a decision of the Commission and Court are criticized, even though it is not questioned that the decision should be implemented in domestic law.

Since *Denmark* and *Norway* have each only once been found guilty of violating the Convention, the number of examples available are rather scarce. However, it happens that decisions on the admissibility or the mere filing of

⁷⁰ *Ibid.*, at cols. 1424 f., 1439 f., 1440 ff., 1452 ff. and 1458 ff.

⁷¹ Cf. Lars Adam Rehof: *Afskedigelse som menneskerettighedsproblem*, [Dismissal as a Human Rights Problem], UfR 1987 B, pp. 193 ff., at p. 196.

⁷² Cf. Application No. 12719/87 (see *infra* section 5.2.1).

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an application give rise to legislative initiatives.

4.3.2.A. Denmark.

Under section 762 of the *Danish Administration of Justice Act*, in its wording before the 1 July 1987,

"... (2) [a] suspect may furthermore be detained on remand when there is a particularly confirmed suspicion [*"særlig bestyrket mistanke"*] that he has committed an offence which is subject to public prosecution and which may under the law result in the imprisonment for six years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty."⁷³

This sub-section was inserted in the Administration of Justice Act in 1935, following an aggravated rape case. The parliamentary committee considering the Bill explained the need for the provision in the following way:

"When everyone assumes that the accused is guilty and therefore anticipates serious criminal prosecution against him, it may in the circumstances be highly objectionable that people, in their business and social lives, still have to observe and endure his moving around freely. Even though his guilt and its consequences have not yet been established by final judgment, the impression may be given of a lack of seriousness and consistency in the enforcement of the law, which may be likely to confuse the concept of justice."⁷⁴

Section 762(2) was amended in 1987 in order to extend its application to certain crimes of violence which were expected to entail a minimum of sixty days' imprisonment. Under the proceedings in the *Folketing*, the compatibility of the Bill with the Convention played a certain role.⁷⁵

The Bill was introduced in the *Folketing* in spite of warnings from legal experts to whom the matter had been submitted.⁷⁶ The Council of the Law

⁷³ Here cited in English from Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 33.

⁷⁴ *Ibid.*

⁷⁵ See FT 1986-87, *Forhandlingerne*, cols. 4781 ff., 5250 ff., 12309 ff., 12887 ff. and 13240 ff.; *Tillæg A*, cols. 2603 ff.; *Tillæg B*, cols. 2155 ff., 2429 ff. and 2635 f.; and *Tillæg C*, cols. 899 f.

⁷⁶ In *Betænkning nr. 978/1983 om varetægtsfængsling i voldssager*, [Report No. 978/1983 on Detention on Remand in Cases of Violence], pp. 54 ff., an expert committee considered, *inter alia*, whether an extended use of detention on remand out of respect for the public interest was compatible with the mentioned recommendations from the Committee of Ministers. The majority of the committee held that this was the case. The minority, on the

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Society [*Advokatrådet*] considered the draft provision to be contrary to Article 5(1)(c) of the Convention,⁷⁷ as well as contrary to the Committee of Ministers's Recommendation of 9 April 1965.⁷⁸ The *Vestre Landsret* and *Rigsadvokaten* [the Attorney-General] both expressed doubts as to the compatibility of the draft provision with the said Recommendation, as well as another Recommendation of 27 June 1980.⁷⁹

In the *Folketing*, at the first reading of the Bill, spokesmen in favour of the Bill considered it compatible with the Convention and the said recommendation, whereas those spokesmen who opposed the Bill considered it to be contrary to the Convention and the recommendations.⁸⁰

In the *Folketing's* Standing Committee of Justice, the Social Democrats introduced a technical change of the draft provision, as well as the inclusion in section 60 of the Administration of Justice Act of the following provision:

"(2) No one shall act as judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned remanded into custody solely under section 762(2), unless the case is tried under section 925 or 925 a [as a case in which the accused pleads guilty]."⁸¹

However, it was the Social Democrats' view that neither the present system nor the system embodied in the Bill on an increased use of detention on remand out of respect for the public interest were contrary to Article 6 of the Convention. Nevertheless they felt the need to point out that in its decision of 9 October 1986 the European Commission had declared admissible the *Hauschildt Case*⁸² in which it expressed doubts as to the compatibility of

other hand, did not find that this was the case since the recommendation of 27 June 1980 recognizes that detention on remand out of respect for the public interest "... may exceptionally be justified in certain cases of particularly serious offences."

⁷⁷ However, in Application No. 13671/88 concerning a case where the accused through all the stages of the case had pleaded guilty and eventually was sentenced to 40 days imprisonment, the European Commission held that detaining him pending trial under section 762(2)(2) of the Administration of Justice Act did not disclose any violation of Article 5(1)(c) of the Convention. Accordingly, the application was declared inadmissible.

⁷⁸ Cf. FT 1986-87, Tillæg B, cols. 2157 f.

⁷⁹ Ibid., at cols. 2176 ff. and 2181.

⁸⁰ Ibid., Forhandlingerne, cols. 5250 ff.

⁸¹ Ibid., Tillæg B, col. 2159. Here cited in English from Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 28.

⁸² Cf. Application No. 10486/83.

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the *Danish* procedural system with the Convention in this field. Accordingly, the Social Democrats feared that "[t]he Commission's attitude must be expected to be intensified regarding the passing of an extension of the use of detention on remand out of respect for the public interest."⁸³

The Bill, including the amendment to section 60, was finally passed as Act No. 386 of 10 June 1987. It was stressed by different members of the *Folketing* that the amendment of section 60 of the Administration of Justice Act was by no means an admission that the *Danish* rules in this particular field were contrary to the Convention.⁸⁵

As will be seen in section 8.4 and chapter 16, in the *Hauschildt Case* the European Court finally found that *Denmark* had violated Article 6 of the Convention. Shortly after this judgment was passed, the *Danish* Ministry of Justice began to consider how to bring the state of *Danish* law into line with Article 6 of the Convention. In the first domestic case following the decision of the European Court, UfR 1990.13, the *Højesteret* went very far in its application of the Convention as interpreted in the *Hauschildt Case*. In a subsequent case in UfR 1990.181 the *Højesteret* recommended that the Legislature considered an amendment to the rules on the disqualification of judges embodied in the Administration of Justice Act (see *infra* section 8.4).

On 17 January 1990 the Minister of Justice introduced a Bill in the *Folketing*⁸⁶ aiming, as it was stated in the explanatory memorandum accompanying the Bill, "... to reconcile the provisions of the Administration of Justice Act on the disqualification of judges with Article 6(1) of the Human Rights Convention on hearings by an impartial tribunal, which was expressed in the judgment of the European Court of Human Rights of 24th May 1989 in the *Hauschildt Case*."⁸⁷ According to the Minister of Justice's written introduction of the Bill,

⁸³ Cf. FT 1986-87, Tillæg B, col. 2160.

⁸⁴ [Denne holdning hos kommissionen må forventes skærpet i forbindelse med vedtagelsen af en udvidelse af brugen af retshåndhævelsesarrest.]

⁸⁵ See, for example, FT 1986-87, Forhandlingerne, cols. 12312 ff. and 12340 f.

⁸⁶ See FT 1989-90, Forhandlingerne, cols. 5173 ff., 10233 f., 10717 ff. and 11229; Folketinget 1989-90, Lovforslag nr. L 150; Skriftlig fremsættelse; Betænkning afgivet af Retsudvalget den 18 maj 1990-, Tillægsbetænkning afgivet af Retsudvalget den 23. maj 1990- and Tilføjelse til tillægsbetænkning afgivet af Retsudvalget den 30. maj 1990 over Forslag til lov om ændring af retsplejeloven.

⁸⁷ Cf. Lovforslag nr. L 150, p. 4. Here cited in English from a translation provided by the *Danish* Ministry of Justice.

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"[t]he provisions of the Bill on *the disqualification of judges* are drafted on the basis of the Human Rights Court's decision in the *Hauschildt Case*.⁸⁸ The rules of the Bill go further, however, than the decision of the Court, as there is proposed disqualification in a number of situations following similar principles as those which manifest themselves in the judgment.

The background for this extension of the scope of the disqualification of judges in relation to the Human Rights Court's decision is that in the future the matter of *Denmark's* fulfilment of the requirements of the Human Rights Convention regarding trial before an impartial tribunal will not be called into question.

According to the Bill, a judge will thus be disqualified from the trial in a criminal case if the judge has previously ordered remand in custody on the basis of a particular confirmed suspicion or has permitted the police to discharge activity of an agent [provocateur] or to stop and open post during the investigation. Furthermore, a judge shall also step down from the trial, according to a concrete discretion of the particular circumstances of the case, if the judge has previously made a decision which is liable to call the complete impartiality of the judge into question."^{89,90}

The proposed extension of the field of disqualification was considered to bring about an increase of the burden on the courts in terms of staff, administration and economy. To remedy this extra burden, it was proposed

⁸⁸ In the draft section 60(2) it was stipulated: "No person shall participate as judge at the trial of a criminal case if - before the trial has commenced of the act to which the indictment relates - that person has made decisions on a remand in custody of the suspect in pursuance of Sect. 762(2) or on taking of measures set forth in Sect. 754 a. or on the opening or stoppage of mail in pursuance of Sect. 781(3). However, this rule shall not apply if the case is being heard in accordance with Sect. 925 or Sect. 925 a. or the case otherwise, concerning the offence that gave rise to measures defined in the 1st sentence above, does not involve an evaluation of the evidence of the suspect's guilt."

The draft section 61, which, in effect, was similar to section 62 of the Act (see *infra* section 8.4), reads as follows: "No person shall act as judge in a case when there are otherwise circumstances that are liable to call complete impartiality of the judge in question", cf. Folketinget 1989-90, Lovforslag nr. L 150, p. 1. Here cited in English from the translation provided by the Danish Ministry of Justice.

⁸⁹ Cf. Folketinget 1989-90, Lovforslag nr. L 150, Skriftlig fremsættelse, p. 1.

⁹⁰ [Lovforslagets bestemmelser om *dommeres habilitet* er udformet på grundlag af Menneskerettighedsdomstolens afgørelse i Hauschildtsagen. Reglerne i lovforslaget går dog noget videre end domstolens afgørelse, idet der foreslås inhabilitet i en række situationer ud fra tilsvarende principper, som kom til udtryk i dommen.

Baggrunden for denne udvidelse af området for dommeres inhabilitet i forhold til Menneskerettighedsdomstolens afgørelse er, at der ikke fremover bør kunne rejses tvivl om, hvorvidt Danmark opfylder kravet i Menneskerettighedskonventionen om rettergang ved en uparisk domstol.

Efter lovforslaget vil en dommer således være inhabil under domsforhandlingen i en straffesag, hvis dommeren forinden har truffet afgørelse om varetægtsfængsling på grundlag af en særlig bestyrket mistanke eller har tilladt politiet at udøve agentvirksomhed eller standse og åbne brevforsendelser under efterforskningen. Endvidere må en dommer vige sit sæde under domsforhandlingen efter et konkret skøn over sagens omstændigheder, hvis dommeren tidligere ved dom har truffet en afgørelse, som medfører, at han ikke fremstår som fuldstændig uparisk.]

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that the five largest *Byretter* [City Courts] should each have one extra judge attached with a particular view to the handling of judge delegate cases.

At the first reading of the Bill in the *Folketing*, all the spokesmen of the different parties were, with one exception, in favour of the Bill as regards the disqualification of judges. They all stressed the importance of the fact that domestic legislation should be amended in such a way that it would be beyond any doubt that *Denmark* was fulfilling its obligations under the Convention; and that the Bill was the expression of this fact.⁹¹ The spokesman who did not support the Bill considered it to be an overreaction to the judgment in the *Hauschildt Case*, but did not question that *Denmark* should amend its legislation so that it would conform to the requirements of the Convention.⁹²

In a joint statement from the Presidents of the High Courts and the City Courts and the Danish Association of Judges, to whom the matter had been subjected, the Bill was criticized in quite strong terms.⁹³ First, there were no objections to the expansion of the instances in relation to complexes of cases in which a judge should be considered disqualified. However, on grounds of principle, it was emphasized strongly that this expansion of the scope of disqualification in relation to complexes of cases ought to be included in the text of the draft section 61 and not only in the explanatory memorandum accompanying the Bill, *i.e.* as a part of the *travaux préparatoires*. Even though it might be difficult to formulate a general rule which clearly indicated the criteria for the situations in which a judge should be considered disqualified, it should at least within the text of the provision have been possible to indicate and delimit some of the main groups of cases. Moreover, the merits of the provision were also considered to be unclear, giving rise to doubts. Second, it was doubted whether the scope of the draft section 60(2) in relation to the ordering of remand in custody during the trial was completely compatible with the Convention in the case of very prolonged trials.

As regards the first point, High Court judge *Peter Rørørdam* characterized the draft section 61 "... as a copy of the decisive criterion in the present section 62, and one must rub one's eyes before one understands that it is really seriously that the Ministry has chosen this way of legislating. We have

⁹¹ FT 1989-90, Forhandlingerne, cols. 5173 ff.

⁹² *Ibid.*, at col. 5185.

⁹³ See Folketinget 1989-90, Betænkning afgivet af Retsudvalget, Bilag 3, pp. 12 f.

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an unpleasant tendency to legislate in the *travaux préparatoires* in this country, but I do not believe that I have ever seen such a hair-raising example of this.⁹⁴

The Ministry of Justice responded to this critique by stating that, as regards the draft section 61, the explanatory memorandum was drafted in such a way that the extended scope of disqualification of judges was indicated as clearly as possible. Accordingly, the content of the rules - which are primarily directed towards judges - should thus not have given rise to doubts in practice. As regarded the fact that the draft section 60(2) did not include decisions on remand in pursuance of section 762(2) made during the trial, the Ministry said that the judgment of the European Court in the *Hauschildt Case* attached importance only to those decisions on remand in custody which were made before the trials commenced, notwithstanding that the applicant also referred to the decisions which had been made during the trial. It also appears, the Ministry explained, from the ruling of the *Højesteret* i UfR 1990.13 (see *infra* section 8.4) that the *Hauschildt Judgment* should be construed to the effect that what is relevant to the question of disqualification is any decision on remand in pursuance of section 762(2) made *prior* to the trial.

On the basis of the critique of the Bill by the legal experts, the Social Democrats and the Socialists withdrew their previously expressed support of the Bill and proposed that the matter be reconsidered in order to secure the quality of the amendment. However, the Bill was, without any discussion about the disqualification of judges under the second and third reading in the *Folketing*, finally passed as Act No. 403 of 13 June 1990.⁹⁶

⁹⁴ Cf. Peter Rørdam: *Justitsministeriets lovforslag om dommerhabilitet*, [The Ministry of Justice's Bill on the Disqualification of Judges], *Juristen* 1990, pp. 93 ff., at p. 95 f.

⁹⁵ [... er en afskrift af det afgørende kriterium i den gældende § 62, og man må gnide sig i øjnene, før man forstår, at det er i fuldt alvor, ministeriet har valgt denne måde at lovgive på. Vi har en kedelig tilbøjelighed herhjemme til at lovgive i motiverne, men jeg tror ikke, at jeg tidligere har set et så hårrejsende eksempel herpå.]

⁹⁶ For a brief account on the amendment, see Torsten Hesselbjerg: *Ny retsplejelovgivning*, [New Administration of Justice Legislation], *Juristen* 1990, pp. 336 ff. Eva Smith: *Menneskerettighedskonventionerne og de nordiske retsplejeordninger*, [The Human Rights Conventions and the Nordic Systems of Administration of Justice], The Proceedings of the 32nd Nordic Meeting of Lawyers, Reykjavík (1990), Vol. 1, pp. 11 ff., at pp. 20 f., criticizes the amendment for being based only on a formal criterion: the distinction between a "justified reason to believe" ["begrundet mistanke om"] and a "particularly confirmed suspicion" ["særlig bestyrket mistanke"], so that disqualification only arises when the judge has previously warranted a measure in criminal procedure which may only be carried out when there exists a particularly confirmed suspicion. Consequently, in the view of Eva Smith, there is a serious

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In Application No. 7658/76⁹⁷ the applicant complained that, as the father of a child born out of wedlock, he could not, under the present *Danish* legislation, successfully petition the courts that he be granted custody of the child in the normal way. While the case was pending before the Commission, the Minister of Justice introduced a Bill⁹⁸ which, *inter alia*, provided as follows:

"The right to the custody of a child born out of wedlock may be accorded of the father by order of court where deemed necessary, having special regard to the welfare of the child. In making the order the court shall attach paramount weight to the father's previous relations with the child."⁹⁹

The introduction of the Bill was not, according to the explanatory memorandum accompanying the Bill, motivated by the case pending before the Commission. However, it was stated that "[i]t may in that connection be mentioned that the European Commission of Human Rights is at the moment dealing with two complaints concerning the very limited possibilities which, under applicable *Danish* law, exist for attributing the custody of a child born out of wedlock to the father."¹⁰⁰¹⁰¹ The Bill was subsequently passed without its relationship to the Convention being discussed in the *Folketing*. Upon the information of the enactment of the said amendment, the Commission declared the application inadmissible since it was of the opinion "... that the new legislation gives the applicant reasonable satisfaction in regard to his present complaint."¹⁰²

In Application No. 8777/79 a *Danish* man complained to the European

risk that the result - rather than being a real strengthening of the accused's legal guarantees under the trial - entails a weakening of his guarantees when remanded in custody, because judges may be expected to rely less on section 762(2) whenever there is the slightest possibility of applying section 762(1).

⁹⁷ Cf. 15 D.R., pp. 128 ff.

⁹⁸ See FT 1977-78, *Forhandlingerne*, cols. 7065 f., 7460 ff., 11654 ff. and 11882 ff.; *Tillæg A*, cols. 4381 ff.; *Tillæg B*, cols. 1569 ff.; and *Tillæg C*, cols. 781 f.

⁹⁹ *Ibid.*, *Tillæg A*, col. 4381. Here cited in English from 15 D.R., p. 130.

¹⁰⁰ *Ibid.*, at col. 4387.

¹⁰¹ [Det kan i den forbindelse nævnes, at Den europæiske Menneskerettighedskommission i øjeblikket behandler to klagesager vedrørende de meget begrænsede muligheder, der efter gældende dansk ret består for at tillægge faderen til et barn uden for ægteskab forældremyndigheden.]

¹⁰² Cf. 15 D.R., p. 130.

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Commission that he had been subjected to discrimination on sexual grounds, contrary to Article 14 of the Convention, taken in conjunction with Article 6 (right to a fair trial, including the right of access to court) and with Article 8 (right to respect for private and family life), in that, under the relevant *Danish* law applicable at the time, his former wife had an unlimited right of access to court to challenge his paternity, while he did not have such a right. In a decision of 8 December 1981, the Commission declared the application admissible.¹⁰³

Under the proceedings on the admissibility, the *Danish* Government informed the Commission that the Matrimonial Committee, an expert committee appointed to consider family law questions, in its report on cohabitation without marriage, *inter alia*, had recommended that "... the mother's right to institute affiliation proceedings and request re-opening should also be subject to a relatively short time-limit".¹⁰⁴ On the basis then existing it was the intention of the Ministry of Justice to introduce an amendment of the Childrens' Act so that the same procedural rules as to the institution of affiliation proceedings would apply to men and women. Accordingly, on 12 March 1982 the Ministry introduced a Bill to this effect.¹⁰⁵ In the explanatory memorandum accompanying the Bill, it was mentioned that a case against *Denmark* on this point was pending before the Commission, and that the Ministry of Justice had informed the Commission that it would seek to have the existing law amended.¹⁰⁶ However, there were no explicit considerations on the compatibility of the existing provision with the Convention, but the eagerness of the Ministry to amend the present state of law on this point without any discussion on its compatibility with the Convention indicates that it was indeed aware of the fact that there could be problems in relation to the Convention.¹⁰⁷ The Bill was passed unanimously by the *Folketing*, without the question of compatibility with the Convention

¹⁰³ Cf. 27 D.R., pp. 105 ff.

¹⁰⁴ Cf. *Betænkning nr. 915/1980 om samliv uden ægteskab*, [Report No. 915/1980 on Cohabitation without Marriage], p. 72. Here cited in English from 27 D.R., p. 117.

¹⁰⁵ See FT, *Forhandlingerne*, cols. 3510 F., 4565 ff., 7466 f. and 7681; Tillæg A, cols. 3861 ff.; Tillæg, cols. 811 ff.; and Tillæg C, cols. 443 ff.

¹⁰⁶ Cf. FT, Tillæg A, cols. 3866 f.

¹⁰⁷ The European Commission subsequently found that there had been a violation of Article 14 of the Convention in conjunction with Articles 6 and 8, whereas the Court did not find that this was the case, cf. Eur. Court H.R., *Rasmussen Case*, Series A, Vol. 81 (1984), the report of the Commission, para 87, and the judgment, para 42.

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being touched upon at all.

4.3.2.B. Norway.

On 31 July 1985 the *Norwegian* Ministry of Justice appointed a Sub-commission to the Royal Commission mentioned above in section 4.2.2, to consider certain questions relating to criminal liability and security measures. While this Sub-commission was working, the European Commission decided the *Case of E v. Norway* in which it held that the *Norwegian* procedure relating to the imposition of security measures (see *infra* chapter 16 and section 18.4) was not wide enough to bear on the conditions essential for the applicant's detention in the sense of Article 5(4) of the Convention.¹⁰⁸ This applied both to the form of judicial review available to the applicant and the speed with which the review had taken place.¹⁰⁹ The application had been introduced on 13 May 1985, *i.e.* only a few months before the Sub-Commission was appointed. The Sub-Commission briefly discussed the requirements of Article 5(4).¹¹⁰ It did not find "... any reason to assess the relationship between valid *Norwegian* law and the Convention. Those rules of procedure the Sub-Commission proposes will satisfy the requirements of the Convention."¹¹¹¹¹² These proposals consisted of establishing by means of an amendment of the Penal Code, a possibility of judicial review of a number of decisions in relation to security measures where this was not the case under the present legislation.

Whether these proposals are being produced in legislation remains to be seen.

4.3.2.C. Sweden.

On 10 March 1983 the *Swedish* Government appointed a one-man committee

¹⁰⁸ Cf. Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), Report of the Commission, para. 144.

¹⁰⁹ However, after the Sub-commission had submitted its report, the European Court found that only the speed of the proceedings amounted to a violation of Article 5(4) of the Convention (see *infra* section 18.4).

¹¹⁰ Cf. *NOU 1990:5 Strafferetlige utilregnelighetsregler og særreaksjoner*, [Criminal Rules on "Non Compos" and Security Measures], p. 37.

¹¹¹ *Ibid.*

¹¹² [... ikke funnet grunn til å vurdere forholdet mellom gjeldende norsk rett og konvensjonen. De saksbehandlingsregler utvalget foreslår vil tilfredsstille konvensjonens krav.]

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to consider the existing rules on arrest and detention and, if necessary, propose amendments to these.¹¹³ The President of *Hovrätten för Övre Norrland* [the Court of Appeal of Upper Norrland], *Carl-Iver Skarstedt*, was appointed to carry out the task. While Mr *Skarstedt* was working, the European Court decided two cases against *Sweden* concerning the procedure in *Sweden* on detention on remand.

In the *Skoogström Case* the Commission found that the fact that the applicant had to wait seven days from his arrest before being brought before a judge or other officer authorized by law to exercise judicial power was a breach of Article 5(3) of the Convention.¹¹⁴ A friendly settlement was subsequently reached between the *Swedish* Government and Mr *Skoogström*. The settlement provided for the introduction of a Bill amending the Code of Judicial Procedure, publication for the benefit of the judiciary and prosecutors of a summary of the Commission's report and reimbursement of Mr *Skoogström's* cost (see *infra* chapter 9). The Court took formal note of the judgment and decided to strike the case off the list (four votes to three).¹¹⁵

In the *McGoff Case* the Court held that the elapse of fifteen days between the arrest and remand in custody of the applicant until he was brought before a judge amounted to a violation of Article 5(3) of the Convention.¹¹⁶

These cases affected the terms of reference of the Committee considerably. The Committee explained this in the following way:

"One of the questions which the Committee was to consider according to its terms of reference was time limits in conjunction with arrest and remand in custody. The question of time limits in conjunction with deprivation of liberty in criminal procedure has become of even greater immediacy in the course of the investigation through two suits against *Sweden* heard by the European Commission of Human Rights and in one of these cases also by the European Court of Human Rights in Strasbourg. According to Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms anyone who is deprived of liberty pending trial shall be brought promptly before a judge or other officer authorized by law to exercise judicial powers.

¹¹³ For a comment on the Committee's task in relation to the European Convention, see Peter Nobel: *Traktaträtt vid anholdande och häktning*, [Treaty Law in relation to Arrest and Detention], SvJT 1984, pp. 394 ff.

¹¹⁴ Cf. Report of the Commission, p. 89.

¹¹⁵ Cf. Eur. Court H.R., *Case of Skoogström*, Series A, Vol. 83 (1984), para. 25.

¹¹⁶ Cf. Eur. Court H.R., *McGoff Case*, Series A, Vol. 83 (1984), para. 27.

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In one of the cases the Commission established that a *Swedish* prosecutor did not fulfil the Convention's demand that he be an officer authorized to exercise judicial powers and that a remand hearing seven days after the deprivation of liberty did not fulfil the Convention's demand of appearance before a court without delay. In earlier cases the European Court has accepted four days after factual deprivation of liberty. This period must, however, include Saturdays, Sundays and public holidays."¹¹⁷

In order to redress the divergence between the *Swedish* rules on detention on remand the Committee proposed a procedure according to which the prosecutor had to submit to the court a request that the suspect be remanded in custody as soon as possible after the factual deprivation of liberty, *i.e.* usually on the same day as the apprehension or on the following day. If, however, for purposes of the investigation or on practical grounds, it was impossible for the prosecutor to come to a decision on the remand in custody issue within this time, he could request that the suspect be remanded in custody at the latest on the third day after his apprehension. When such a question was raised, the Court, it was proposed, should hold a hearing without delay. Normally this should be possible on the same day as the prosecutor raises the question or on the following day. Accordingly, a remand hearing should normally be held on the second day after the deprivation of liberty, and only in exceptional cases should the full time of four days allowed by the European Court be utilized.¹¹⁸

The Government subsequently introduced a Bill, drafted in accordance with the proposals of the Committee, amending the Code of Judicial Procedure on this point.¹¹⁹ In the explanatory memorandum accompanying the Bill it was explained that "... the question of an adjustment of the *Swedish* rules to the norms which have emerged from the practice when the European Convention is interpreted are therefore more a question of just such an adaption to a formal system than a question of the rule of law in its proper meaning."¹²⁰¹²¹

¹¹⁷ Cf. *SOU 1985:27 Gripen-anhållen-häktad. Straffprocessuella tvångsmedel m m.* [SOU 1985:27 Seized, arrested, detained: Coercive Measures in Criminal Procedure], p. 44. The report contained an analysis of the above-mentioned cases, at pp. 54 ff.

¹¹⁸ *Ibid.*, at. pp. 44 f.

¹¹⁹ See Riksdagen, Proposition 1986/87:112.

¹²⁰ *Ibid.*, at p. 26.

¹²¹ [... frågan om en anpassning av de svenska reglerna till de normer som har kommit fram i praxis vid tolkningen av Europakonventionen är det därför mer en fråga om just en

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The Council of Legislation to whom the Bill was submitted for comments stated in general terms that *Sweden* as a party to the Convention had undertaken to adjust its legislation to the provisions of the Convention and the interpretation of those provisions that the European Convention and Court considered appropriate. If the Strasbourg organs stated that certain *Swedish* provisions were not compatible with the Convention, the conclusion had to be that the *Swedish* provisions did not meet the requirements of the rule of law which could be deduced from the Convention. Contrary to what was stated in the explanatory memorandum "... the Council of Legislation considers therefore that an adjustment to the norms which have emerged from the practice when the European Convention is interpreted, are questions of the rule of law in its proper meaning and not primarily an adjustment to a formal system."¹²²¹²³ The Council had, with some minor modifications, no objections to the Bill.¹²⁴

The Standing Committee on Constitutional Affairs subsequently recommended the Bill but proposed a change in one of its provisions so that it became manifest that in no circumstance could more than four days elapse between the arrest and the remand hearing in court.¹²⁵

In its judgment of 23 September 1982 in the *Sporrong and Lönnroth Case*¹²⁶ the European Court concluded that *Sweden* had violated its obligations under Article 6 of the Convention. The case essentially concerned the fact that certain administrative decisions taken by the Government as the first and only instance could not be subject to judicial review by the courts. In a fairly high number of subsequent decisions from both the European Commission and Court this view was confirmed and also considered to apply when the Government took the decision on appeal from a lower administrative authority (see *infra* section 18.3.2).

The *Swedish* Government first took a narrow view of the impact of the

sådan anpassning till ett formellt system än en fråga om rättssäkerhet i egentlig mening.]

¹²² Ibid., at p. 84.

¹²³ [... anser lagrådet därför att en anpassning till de normer som kommit fram i praxis vid tolkningen av Europakonventionen är en fråga om rättssäkerhet i egentlig mening och inte i första hand en anpassning till ett formellt system.]

¹²⁴ Ibid.

¹²⁵ Cf. Riksdagen, Justitieutskottets betänkande 1987/88:7, p. 29 f.

¹²⁶ Cf. Eur. Court H.R., *Sporrong and Lönnroth Case*, Series A, Vol. 52 (1982).

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judgment on domestic law and considered that no administrative measures were required.¹²⁷ However, certain amendments of the legislation on expropriation, building and planning had already or were due to take place. In the light of the growing case-law of the Strasbourg organs on Article 6(1) of the Convention, in particular the cases directed against Sweden, it became clear that something had to be done to remedy the discrepancy between the requirements of Article 6(1) of the Convention and that part of Swedish administrative law where no judicial review existed.¹²⁸

In June 1986 the Ministry of Justice published a report which contained the proposal of a Bill providing for a general right to have administrative decisions reviewed by *Regeringsrätten*, including the decisions of the Government, in cases in which such a possibility did not exist under the present legislation, as well as an amendment of the legislation on expropriation.¹²⁹ As regards the relationship between Article 6(1) of the Convention and domestic Swedish law, it was concluded that "[i]f one proceed from this interpretation [of the practice of the European Commission and Court on Article 6(1)] it would probably become clear that the Swedish legislation does not completely meet the requirements of the Convention."¹³⁰¹³¹ To the extent one wants "... to adapt Swedish legislation to the interpretation of the Convention established by the European Court, a possibility for having a judicial review of the administrative decisions concerned must be created."¹³²¹³³

¹²⁷ For further information, see Hans Danelius: *Judicial control of the administration - a Swedish proposal for legislative reform* in Matscher & Petzold (1988), pp. 115 ff.

¹²⁸ See, for example, Torkel Opsahl & Erik Friberg: *Sverige fällt av Europadomstolen*, [Sweden sentenced by the European Court], SvJT 1983, pp. 401 ff., at pp. 414 ff.; and Erik Friberg: *Europakonventionens krav på domstolsprövning av förvaltningsbeslut*, [The Requirement of Judicial Review of Administrative Decisions of the European Convention], SvJT 1986, pp. 325 ff., at pp. 333 ff.

¹²⁹ See *Ds Ju 1986:3 Europarådskonventionen och rätten till domstolsprövning i Sverige*, [The Convention of the Council of Europe and the Right to Judicial Review in Sweden]. The conclusions of the report are reproduced in English by Hans Danelius, op.cit., *passim*.

¹³⁰ Cf. *Ds Ju 1986:3*, p. 55.

¹³¹ [Utgår man från denna tolkning torde det stå klart att den svenska lagstiftningen inte fullt ut uppfyller konventionens krav.]

¹³² *Ibid.*, at p. 56.

¹³³ [... anpassa den svenska lagstiftningen till den tolkning av konventionen som den europeiska domstolen har lagt fast måste en möjlighet för enskilda parter skapas att få till stånd en domstolsprövning av de förvaltningsbeslut som det här gäller.]

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It is quite remarkable that the report contained a proposal that the Government's decisions in large areas should be subject to judicial review by a court. The Swedish Government had so far been very reluctant to accept such a review and it seems, at least in principle, to have had a significant impact on the division of powers between the executive and the judiciary.¹³⁴

The proposal was to a large extent based on an extension of the existing possibility of the re-opening of a case in exceptional circumstances ["*resning*"] before *Regeringsrätten* (see *infra* sections 17.2.3 and 18.3.2) so that the jurisdiction of the Court in this respect would be extended to a general competence to review, on appeal, the decisions of the final administrative instances.¹³⁵ Thus, it would be possible for the Court to quash unlawful decisions so that administrative authorities would have to examine and reconsider the case in all its aspects. It was pointed out in the report that the re-opening of a case did not fulfil the requirements of Article 6(1) of the Convention as interpreted in, for instance, the *Sporrong and Lönnroth Case*,¹³⁶ but the proposed extension of the competence of *Regeringsrätten* made it "... difficult to see anything but that the possibility of review should be acceptable from the point of view of the Convention."¹³⁷¹³⁸

The criterion "civil rights and obligations" employed in Article 6(1) of the Convention was not found to be sufficiently precise to be used in the present context. Instead, it was proposed to delimit the competence of *Regeringsrätten* in such a way that the jurisdiction of the Court would be extended to any decision involving the exercise of public power. It was also proposed to apply of a provision relating not only to matters provided for in Chapter 8, section 2 or 3, of the Instrument of Government, *i.e.* provisions relating to the personal status of private subjects or to their personal and economic interrelationships, but also to the sphere where the *principle of*

¹³⁴ Cf. Hans Danelius, *op.cit.*, pp. 122 f. For a historical account on the division of powers between the executive and the judiciary in Sweden, see Hans Danelius, *op.cit.*, pp. 116 ff.; and Stig Jägerskiöld: *Administrative Law* in Stig Strömholm (ed.): *An Introduction to Swedish Law*, 2nd edition, Stockholm (1988), pp. 79 ff.

¹³⁵ Cf. Ds Ju 1986:3, pp. 8 and 59.

¹³⁶ Cf. Eur. Court H.R., *Sporrong and Lönnroth Case*, Series A, Vol. 52, para. 86.

¹³⁷ Cf. Ds Ju 1986:3, p. 63.

¹³⁸ [... svårt att se annat än att överprövningsmöjligheten skulle bli godtagbar från konventionens synpunkt.]

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legality was applicable (see *supra* section 2.1 and *infra* chapter 9).¹³⁹

The possibility of having an administrative decision reviewed by *Regeringsrätten* was proposed, although subjected to the following restrictions: (1) the review should be exercised only on appeal from the individual; (2) the competence of *Regeringsrätten* should be limited in such a way that the Court would only be able to hold an administrative decision invalid and refer it back to the administrative authority but not take any decision on its merits; (3) decisions which might otherwise be reviewed by a court would not be brought before *Regeringsrätten*; (4) all administrative remedies should be exhausted before *Regeringsrätten* admit an appeal; (5) the review should be directed only against the legality of the administrative decision, that is, whether or not it is contrary to "the law or to any other statute"; (6) the normal rules of the Act of Administrative Procedure on when a public hearing should be held in the case should also apply to this kind of review of administrative decisions;¹⁴⁰ and (7) the decisions of certain quasi-judicial administrative legal bodies were exempted from review under the proposed rules.¹⁴¹

It was emphasized, though not very convincingly, that the proposal was not only made in order to reconcile domestic *Swedish* law to the requirements of the Convention as set forth in the interpretation of the European Commission and Court. "In a community governed by law such as ours, it is important that endeavours to enforce the rule of law lead to a continuous development."^{142,143}

The report was subsequently, in accordance with the normal legislative procedure in *Sweden*, submitted to various authorities for their comments. It appears from the published summary of these comments¹⁴⁴ that the majority of the authorities heard, generally speaking, recommended the proposals of

¹³⁹ *Ibid.*, at pp. 67 f.

¹⁴⁰ The report added in this respect that "[i]t is of course possible that the view taken by *Sweden* will change if on this point the European Court interprets Article 6 differently", cf. *Ds Ju* 1983:3, p. 70. Here cited in English from Hans Danelius, *op.cit.*, p. 121.

¹⁴¹ *Ibid.*, pp. 65 ff.

¹⁴² *Ibid.*, p. 64.

¹⁴³ [I ett rättssamhälle av vår typ är det viktigt att strävandena att fördjupa rättssikkerheten leder till en fortlöpande utveckling.]

¹⁴⁴ Cf. Riksdagen, Proposition 1987/88:69, Bilaga 2, pp. 168 ff.

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the report. However, these authorities recommended that the question of judicial review be regulated in the long run not by one general rule but by several detailed rules within each branch of administrative law with due consideration for the specific problems and requirements of each branch. A number of critical observations were, however, expressed by, *inter alia*, *Justitiekansleren*, the Faculty of Law of the University of Stockholm and the Faculty of Law of the University of Lund.¹⁴⁵ These applied in particular to (1) the fact that *Regeringsrätten*, under the proposal, would act as a mere court of cassation;¹⁴⁶ (2) that the remedy proposed was similar, or even more restrictive, than the re-opening of a case before *Regeringsrätten* which the European Court had declared did not fulfil the requirements of Article 6(1) of the Convention;¹⁴⁷ (3) the review proposed had the character of an extraordinary remedy;¹⁴⁸ (4) that some quasi-judicial administrative bodies' decisions were exempted from review, since it was questioned whether the Commission and Court would accept that these bodies were "tribunals" within the meaning of Article 6(1) of the Convention when they were not courts according to *Swedish* law;¹⁴⁹ (5) that the review was only contemplated as concerning whether the decision was contrary to "the law or to any other statute";¹⁵⁰ and (6) the fact that there was no absolute right to a public hearing before *Regeringsrätten*.¹⁵¹

On the basis of the report and the comments on it, the Government introduced a Bill which, as is stated in the explanatory memorandum accompanying the Bill, "[f]or the purpose of securing that *Swedish* law correspond to the requirements of the European Convention for access to judicial review, a new possibility for having the decisions of the Government and other authorities in administrative affairs reviewed by *Regeringsrätten* is introduced. The new possibility of review is framed as complementary to

¹⁴⁵ The Faculty of Law of the University of Upsala, on the other hand, recommended the proposals of the report as they stood, cf. Riksdagen, Proposition 1987/88:69, Bilaga 2, pp. 169, 207 and 222.

¹⁴⁶ Cf. Riksdagen, Proposition 1987/88:69, Bilaga 2, pp. 169 and 207.

¹⁴⁷ *Ibid.*, at pp. 174 ff.

¹⁴⁸ *Ibid.*, at pp. 175 and 201.

¹⁴⁹ *Ibid.*, at pp. 193 and 201 ff.

¹⁵⁰ *Ibid.*, at pp. 207 ff.

¹⁵¹ *Ibid.*, at pp. 211 ff.

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those possibilities of review already existing. The introduction of it will be followed up by partial overhauls of the legislation in the areas which are affected."¹⁵²¹⁵³

The Bill was drafted along the lines set forth in the report of the Ministry of Justice.¹ However, the scope of the review was extended in comparison with the one proposed in the report so that *Regeringsrätten* could examine whether an administrative decision was "consistent with applicable legal rules". According to the explanation given in the explanatory memorandum accompanying the Bill,¹⁵⁴ this meant that the review would not be limited to an examination of the application of the law as such, but would include an assessment of the facts which formed the basis of the application of the law.¹⁵⁵ "On the other hand, the review... [should]... not bear upon an application of the Articles of the European Convention, since these do not form part of our domestic legal system, save that the content of the Convention may have significance for the interpretation of *Swedish* legal rules."¹⁵⁶¹⁵⁷ Furthermore, it was suggested that the number of cases in which the proposed review would not be allowed to apply should be extended to certain other cases,¹⁵⁸ and also that any petition to *Regeringsrätten* should have no suspensive effect.¹⁵⁹ Finally, it was proposed that the Bill should contain a provision according to which the Act would only be applicable in the period from 1 May 1988 to the end of 1991 so that the experience gained in this period could be used as the basis for the final

¹⁵² Cf. Riksdagen, Proposition 1987/88:69, p. 15.

¹⁵³ [I syfte att säkerställa att svensk rätt motsvarar europakonventionens krav på tillgång till domstolsprövning införs en ny möjlighet att få beslut som regeringen och andra myndigheter meddelar i förvaltningsärenden prövade i regeringsrätten. Den nya prövningsmöjligheten utformas som ett komplement till de prövningsmöjligheter som finns i dag. Införandet av den följs upp genom områdevisa översyner av lagstiftningen på de områden som berörs.]

¹⁵⁴ *Ibid.*, at p. 23.

¹⁵⁵ A draft Bill was submitted to the Council on Legislation, which considered that it met the requirements of the Convention. In particular, it noted that the scope of the judicial review as regards law and fact was similar to the one in *Danish* and *Norwegian* administrative law, cf. Riksdagen, Proposition 1987/88:69, Bilaga 4, p. 234.

¹⁵⁶ *Ibid.*, at p. 23.

¹⁵⁷ [Däremot skall prövningen inte avse en tillämpning av europakonventionens artiklar, eftersom dessa inte utgör någon del av vår inhemska rättsordning, låt vara att konventionens innehåll kan ha betydelse för tolkningen av svenska rättsregler.]

¹⁵⁸ *Ibid.*, at pp. 2 and 21 ff.

¹⁵⁹ *Ibid.*, at pp. 25 ff.

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framing of the legislation in this area.¹⁶⁰

The Standing Committee on Constitutional Affairs, to which the Bill was referred, was of the opinion that the proposal for judicial review "... should be seen as an important part of the endeavours to secure that *Swedish* law corresponds, as soon as possible, to the requirements of the Convention."¹⁶¹¹⁶² A minority of the Committee was not convinced that the Bill was in accordance with the Convention on all points. Accordingly, they proposed that the decisions of the above-mentioned quasi-judicial bodies should not be exempted from review, and that a public hearing should be held whenever one of the parties requested it.¹⁶³

The *Riksdag* subsequently passed the Bill (Act No. 1988:205) on the basis of the recommendation of the Constitutional Committee.¹⁶⁴

In Applications Nos. 8588/79 and 8589/79¹⁶⁵ (see *infra* section 18.3.2) the European Commission held that compulsory proceedings before three arbitrators without recourse to the ordinary courts in a case concerning a dispute over the prices of some shares, which the majority shareholder was legally entitled to buy, did not meet the requirements of Article 6(1) of the Convention.

The *Swedish* Government therefore subsequently introduced a Bill for the Amendment of the Stock Corporations Act of 1975. The Bill provided that a party not satisfied with a decision of the arbitrators could petition the ordinary courts. In the explanatory memorandum accompanying the Bill it was explained.

"In a case against *Sweden* before the European Commission of Human Rights, the question has arisen whether the *Swedish* rules about arbitration in case of dispute about the compulsory purchase procedure relative to minority shares does satisfy the requirement in the Convention for the Protection of Human Rights and Fundamental Freedoms, that the determination of civil rights shall take place in an independent and impartial tribunal in a public hearing. Personally I find this a fitting question, and I consider the matter as follows.

¹⁶⁰ Ibid., at pp. 29 f.

¹⁶¹ Cf. Riksdagen, KU 1987/88:38, p. 6.

¹⁶² [... ses som ett viktigt led i strävandena att så snabbt som möjligt säkerställa att svensk rätt motsvarar konventionens krav.]

¹⁶³ Ibid., at pp. 13 ff.

¹⁶⁴ Cf. Riksdagens Protokoll 1987/88:100, 14 april 1988.

¹⁶⁵ Cf. 38 D.R., pp. 31 ff.

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The question that is most often in issue in connection with the compulsory purchase of minority shares concerns the size of the price. Since questions of evaluation often require particular expertise, it seems proper that such disputes should be handled by arbitrators. In *Swedish* company law, the principle prevails since a long time that disputes about compulsory purchase, at least in the first instance, shall be determined by arbitrators. In my view there are strong reasons for keeping this procedure, which has worked well in practice, also in the future.

Nor can I find that there is any practical possibility to let arbitrators be appointed in any other way than the one now prevailing.

However, I advocate a return to the procedure that prevailed under the Stock Corporation Act of 1944, viz that the arbitration award should be subject to judicial review not only when errors of a procedural nature have occurred in the arbitration, but also when a party is dissatisfied with the opinion of the arbitrators."¹⁶⁶

4.4. Conclusions.

The exposition in the previous sections suggests that the task of securing that domestic law conforms to the Convention is a manageable one. Although from time to time it may be difficult to predict the innovations of the European Court, it still seems possible to ensure that domestic law is compatible with the Convention without any real problems.

The political will to make sure that domestic law conforms to the requirements of the Convention seems to be very strong in *Denmark*; all (responsible) political parties usually agree on amendments aiming at bringing domestic law into line with the Convention. The same must be assumed to be the case in *Norway*, but the lack of explicitly discussed cases in the *Storting* does not allow for clear conclusions. However, some of the *Danish* examples discussed show that the quality of the amendments made has been affected by the eagerness to bring domestic law into line with the Convention as quickly as possible. In *Sweden* there seems to have been somewhat more debate on whether or not, and to what extent, decisions of the European Commission and Court should be implemented in domestic law. This has basically applied to the question of the lack of judicial review of all kinds administrative decisions. This may be explained by two facts. First, these decisions have concerned a question where there has been a strong historical tradition for letting the Government (originally the King-in-Council) be the final instance in administrative matters with political implications. Second, the fact that many of the cases in which *Sweden* has been found

¹⁶⁶ Here cited in English from Jacob W.F. Sundberg: *Human Rights in Sweden. The Annual Reports 1982-1984*, Stockholm (1985), p. 67.

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guilty of a violation of Article 6(1) of the Convention have concerned what could be characterized as welfare-state legislation. This has rendered it possible to use the Convention as an argument in the general political debate on this legislation. Thus the right-wing parties in opposition usually argue for a stronger position of the Convention in *Swedish* law.

Apart from the impact of decisions of the Commission and Court to which the State has been a party, the Convention itself plays a certain role in the preparation of legislation. It is possible to find examples where the Convention or decisions directed against other states have been the principle reason for amending domestic legislation. Moreover, it is also interesting to observe that it is to a very large extent within exactly the same fields of law that the *Scandinavian* expert committees have discussed the Convention: aliens legislation, coercive measures in the psychiatry, the *principle of legality* within criminal law etc. The scope of these considerations varies considerably, however, from committee to committee.

PART III

The Application of the European Convention in Domestic Scandinavian Law

CHAPTER 5

Introductory Remarks: the Incorporation of International Law into Domestic Law

5.1. General Reservations relating to International Law.

International law that needs to be incorporated into domestic law is normally *reformulated*, but only that part of the treaty which needs to be implemented, either by the promulgation of a statute or in the form of an administrative regulation (depending on whether or not it changes existing legislation). However, it happens that a treaty is *adopted* completely and embodied in a statute by which all the provisions of the treaty come into force in domestic law.¹ Moreover, some statutes contain a provision that the statute itself shall be applied subject to reservations following from international law. In the latter situations one could - in accordance with the terminology introduced by *Jan Erik Helgesen* - talk about "*sector-monism*".² That is to say that to the extent specified in either the statute adopting the treaty into domestic law, or in the provision containing the general reservation, international law is applied directly in domestic law. A few examples of such *sector-monism* should be mentioned here:

According to section 12 of the *Danish* Penal Code, the provisions in sections 6-8 of the Code on jurisdiction in criminal cases are generally limited by "... the exceptions recognized in international law".³ An example of the application of this provision is UfR 1955.571. An American engineer who carried out work for the *Danish* Air Force had been convicted for a traffic offence in the City Court. The Public Prosecutor appealed for acquittal since the engineer, according to a statement from the Ministry of Foreign Affairs, held the same position, as regards extraterritoriality, as the clerical staff at an embassy.⁴

¹ See for example Act No. 252 of 16 June 1968 on Diplomatic Relations which adopts the 1961 Vienna Convention on Diplomatic Relations into domestic *Danish* law.

² Cf. Helgesen (1982), pp. 53 f.

³ [... ved de i folkeretten anerkendte undtagelser.]

⁴ See also UfR 1941.963 where *Den særlige Klageret* [the Special Court of Revision] granted a re-opening of a case on the basis of a statement from the Ministry of Internal

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Section 1 of the *Danish Act No. 395 of 12 July 1946 on Penalty for War Criminals* laid down that a person who, "... under violation of applicable laws and customs of international law concerning occupation and warfare",⁵ has committed a criminal offence under *Danish* law, or to the detriment of *Danish* interests, should be punished.

The question of whether or not certain actions carried out by German officials during the occupation were lawful under international law was raised in relation to the application of this act in a number of cases before *Danish* courts.⁶ The crucial preliminary questions for the courts in these cases⁷ were the scope of internationally lawful reprisals carried out against the *Danish* civil population during the occupation and the scope of lawful self-defence for the occupation authorities under international law. Although the courts in these cases had to apply international law to a greater extent than usual at that time, they did not seem to have any difficulties in interpreting international law in this respect; except on one count, the actions carried out by the accused were all found unlawful under international law.⁸

The *Norwegian Act of Criminal Procedure* lays down in section 4 that the Act shall be applied "... with the restrictions which are recognized under international law or follow from an agreement with a foreign state."⁹ That the provision talks about "restrictions" is somewhat misleading. As regards human rights conventions it may be more appropriate to say "in accordance with", since these conventions in fact put certain requirements on the criminal procedural system within the Contracting States.¹⁰ This in fact means that the ECHR within criminal procedure is incorporated into domestic *Norwegian*

Affairs on the applicability of a treaty between *Denmark* and *Poland* in the case at issue.

⁵ [Under krænkelser af de for besættelse og krig gældende folkeretlige love og sædvaner.]

⁶ On the measures taken against German war criminals in *Denmark*, see Ditlev Tamm: *Reisoppgøret efter besættelsen* [The Purge After the Occupation], Copenhagen (1984), Vol. 2, pp. 621 ff.

⁷ Cf. UfR 1945.189, UfR 1948.1326, UfR 1949.833, UfR 1950.453, and UfR 1950.565. The cases are discussed by Ditlev Tamm, *op.cit.*, pp. 650 ff.

⁸ See UfR 1949.833. In UfR 1950.453 there was some difference of opinion in relation to the scope of lawful reprisals under international law between the High Court and the *Højesteret*.

⁹ [... med de begrensninger som er anerkjent i folkeretten eller følger av overenskomst med fremmed stat.]

¹⁰ See Hans Christian Bjerke & Erik Keiserud (eds.): *Straffeprocessloven med kommentarer*, [The Act of Criminal Procedure with Comments], Oslo (1986/87), pp. 35 ff.

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law.¹¹ As will be seen in section 8.2, the *Høyesterett* has on a number of occasions dealt with the question of the impact of the Convention on *Norwegian* criminal procedure without section 4 being as much as mentioned; the Court has instead based its reasoning on general principles of the application of international law in domestic law.

An example of considerations as to this provision is NRt. 1973.1480 in which the *Høyesterett's* Interlocutory Appeals Committee dealt with the question of whether or not, under the Vienna Convention on Diplomatic Relations or under general principles of international law, there existed a principle according to which a person who does not possess diplomatic immunity himself, but who has been arrested, suspected of having committed serious crimes, in an area subjected to diplomatic immunity, could be taken into custody. However, the Committee did not find that such principle existed and, consequently, the case was decided solely on the basis of domestic law.

Another *Norwegian* example is section 14 of the *Norwegian* Penal Code which contains a provision similar to section 12 of the *Danish* Penal Code.

Finally, it should be mentioned that section 407 of the *Norwegian* Code of Civil Procedure and section 391(2) of the Act of Criminal Procedure provide for the re-opening of cases in which the decision "... is assumed, directly or indirectly, to be based on an understanding of international law under a treaty which deviates from the understanding an international court in a similar case establishes as binding upon *Norway*, and this understanding is considered to result in a different decision."¹²

The *Swedish* Penal Code contains in Chapter 2, section 7, a provision laying down that the application of the Code as well as the jurisdiction of the *Swedish* courts in general are limited by what "... follows from generally recognized principles in international public law".¹³ According to Chapter 22, section 11, of the Code, a person who under warfare acts in a way which is

¹¹ Cf. Torkel Opsahl: *Menneskerettighetene i straffeprocessen*, [Human Rights in Criminal Procedure], in *Lov og Frihet. Festskrift til Johs. Andenæs på 70-årsdagen, 7. september 1982*, Oslo (1982), pp. 487 ff., at p. 489, with a general discussion of human rights in *Norwegian* criminal procedure; and Jørgen Aall: *Siktedes rett til vitne-eksaminasjon etter den europeiske menneskerettighetskonvensjon og etter norsk rett*, [The Accused's Right to question Witnesses under the European Convention on Human Rights and under *Norwegian* Law], *Lov og Rett* 1988, pp. 478 ff., at pp. 479 f.

¹² [... antas direkte eller indirekte å bygge på en forståelse av folkeretten etter en traktat som avviker fra den forståelse en internasjonal domstol i samme saksforhold slår fast som bindende for Norge, og denne forståelse antas å burde føre til en annen avgjørelse.]

¹³ [... som följer av allmänt erkända folkrättsliga grundsatser.]

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contrary to, *inter alia*, principles of international law shall be sentenced for a crime of international law. However, it has not been possible to find any examples of the application of these provisions.

In areas covered by *sector-monism*, international law is, at least from a theoretical point of view, *per se* compatible with domestic law; the courts formally apply the statutes which incorporate international law into domestic law, although often the crucial question in the case at issue is one of international law. The decision of the cases brought before the Court often presupposes that a stand on a preliminary question of international law has already been adopted; in this case the application of the domestic rule frequently becomes very simple. However, court practice concerning the application of international law within the sphere of *sector-monism* is quite scarce and does not seem to have given rise to any specific problems.

5.2. Incorporation of Restricted Obligations of International Law.

5.2.1. Incorporation through Statutes.

As mentioned in section 2.1, the most common way of incorporating treaties into domestic *Scandinavian* law is by *reformulating* them (transformation) in a specific statute. If, later on, a divergence or even a clear conflict between the treaty and the statute incorporating it into domestic law is found, it will be natural to interpret the domestic rule in the light of the treaty, unless it is otherwise *clearly indicated*. One is here facing cases where it is relatively uncomplicated to establish the purpose of the statute. Therefore, it is particularly well-founded to pay special attention to the *travaux préparatoires* of the statute - including the treaty itself - and thus employ a so-called *subjective interpretation*¹⁴ or - as it is known as in *English* law - *purposive construction* since the purpose of enacting the domestic rule is, it may be assumed, to incorporate the treaty into domestic law. In other words, the treaty is an important part of the *travaux préparatoires* of the statute incorporating it into domestic law.

This view appears clearly from a couple of the *Højesteret's* decisions. In UfR 1975.30 the *Højesteret* made *Danmarks Radio* [the Danish Broadcasting

¹⁴ See Eilshou Holm (1981), p. 127. On subjective interpretation and the weight of the *travaux préparatoires* in the application of *Scandinavian* law in general, see for example Eckhoff (1987), pp. 57 ff. and 126 ff.; Ross (1958), pp. 142 ff., 152 and 157; Per Augdahl: *Rettskilder* [Sources of Law], 3rd edition, Oslo (1973), pp. 83 ff.; and Preben Stuer Lauridsen: *Rettslæren* [The Jurisprudence], Copenhagen (1977), pp. 275 ff.

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Company] stick to its previously adopted interpretation of the Copyright Act and overruled a more recent practice which, though undisputed in the case, was contrary to the Bern Convention. The Bern Convention had been ratified by *Denmark* without reservation and it was incorporated into domestic law by the Copyright Act. While the case was pending, an amendment of the Copyright Act was passed which, according to the explanatory memorandum accompanying the bill, was intended to redress the divergence between the wording of the Act and the Convention. The defendant before the *Højesteret*, a private publisher whose copyright had been infringed, maintained that his copyright was already protected under the existing legislation.¹⁵ The Court did not make explicit references to the Convention in its judgment, nor was the Convention discussed in Justice *Jørgen Trolle's* extrajudicial comment¹⁶ on the judgment. In this comment, however, it was stated in more general terms that "... there will be a natural tendency to understand a statute as fulfilling our international obligations rather than understand it [the statute] as being contrary to them [the international obligations]".¹⁷¹⁸ On the other hand, the Court did not consider the appellant's argument that, notwithstanding the accession to and the ratification of the Convention, these treaties could not be regarded as a part of *Danish* law and, consequently, the provision at issue could not be interpreted restrictively contrary to the intentions of the Legislature.

In UfR 1975.263 it was stated in the explanatory memorandum accompanying a bill incorporating the CMR Convention into domestic *Danish* law that "... this provision rightly belongs under the Road Traffic Act and will be included in a subsequent amendment of this act". This statement

¹⁵ Frederik Harhoff: *Skønheden, og Udyret*, [The Beauty and the Beast], in *Rechtsvidenskabeligt Institut B, Studier nr. 18, Årsberetning 1986*, Copenhagen (1987), pp. 69 ff., at pp. 77 f., does not find that a situation of interpretation was present in this case because the amendment of the Copyrights Act was considered a confirmation of the already applicable legal position.

¹⁶ Extrajudicial comments on *Højesteret* decisions are commonly used in *Denmark*. Such comments are not official notifications from the Court, nor are they supplements to the judgment, but they may be viewed as the individual judges' remarks on the decision on the basis of their participation in deciding the case. See e.g. Torben Jensen: *Højesterets arbejdsform*, [The Supreme Court's Method of Work], *Særnummer af UfR i anledning af Højesterets 325 års jubilæum*, Copenhagen (1986), pp. 115 ff., at p. 141.

¹⁷ [... vil der være en naturlig tilbøjelighed til at forstå en lov som opfyldende vore folkeretlige påtagne forpligtelser fremfor at forstå dem som værende i strid med dem.]

¹⁸ Cf. Jørgen Trolle: *Forfatterret - Kunstnerret - Fjernsynets ret*, [Copyright - Artistic Copyright - The Television's Right], UfR 1975 B, pp. 108 ff., at p. 112.

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in the *travaux préparatoires* was considered by the *Østre Landsret* a *clear indication* that the Legislature did not want to incorporate the CMR Convention completely (for the time being) into domestic law (see *infra* section 6.2). However, this decision appears to be the only *Scandinavian* example of a case in which a court has found that it was *clearly indicated* that a conflict between a treaty and the statute incorporating it into domestic law was intended. Although this statement in the *travaux préparatoires* was not that clear regarding the Legislature's intention not to incorporate the Convention completely, it may on the basis of this judgment, in conjunction with the subsequent UfR 1990.13 (see *infra* section 8.4), be concluded that it shall appear clearly in unambiguous terms from the *travaux préparatoires* that the Legislature did not want to incorporate the treaty completely if the courts are to consider it *clearly indicated* that this is the case.

The *Højesteret's* in the *HT Case* in UfR 1986.898 concerned a case in which *only a part* of the ECHR had been incorporated into domestic *Danish* law. The plaintiffs in the case were eight bus drivers who had resigned from their trade unions. These resignations had caused extensive work stoppages and boycotts. Consequently, the Metropolitan Council dismissed the drivers, although a statute prohibiting dismissals on the basis of membership of an association was in force when the drivers were dismissed. As a consequence of the judgment of the European Court of Human Rights in the *British Rail Case*,¹⁹ this statute had been enacted in order to fulfil *Denmark's* obligations under the Convention. The plaintiffs argued that the dismissals were not only contrary to the Act but also to Article 11 of the Convention.

On the relationship to the Convention the *Højesteret* stated:

"The invoked provision in Article 11 of the Human Rights Convention *cannot be applied directly*, but the judgment of the dismissals should be carried out on the basis of Act No. 285 of 9 June 1982 on Protection Against Dismissal on the Grounds of Association Relations, *which was passed in order to fulfil Denmark's obligations under Article 11 of the Convention*" (emphasis added).²⁰

Then, it was stated that the dismissals were contrary to the domestic statute

¹⁹ Cf. Eur. Court H.R., *Case of Young, James and Webster*, Series A, Vol. 44 (1981).

²⁰ [Den påberåbte bestemmelse i Menneskerettighedskonventionens art. 11 kan ikke anvendes direkte, men bedømmelsen af afskedigelserne må ske efter lov nr. 285 af 9. juni 1982 om beskyttelse mod afskedigelse på grund af foreningsforhold, der blev vedtaget for at opfylde Danmarks forpligtelser efter konventionens art. 11.]

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and the plaintiffs were awarded damages, since the statute did not provide for reinstatement.

In an extrajudicial comment on the judgment Justice *Erik Riis* discussed the application of the Convention in the case:²¹

"The *Højesteret* did not find that the European Convention on Human Rights was directly applicable in this case. It is probably very doubtful whether significance can be ascribed to a convention that is even older than the 1953 Constitution in the laying down of the contents of the Constitution. To this must be added that Act No. 285 of 9 June 1982 on Protection against Dismissals on the Grounds of Association Relations was passed in order to fulfil *Denmark's* obligations under Article 11 of the Convention. *This statute was not found to leave any doubt which could be clarified by reference to the Human Rights Convention*" (emphasis added).²²³

²¹ Cf. Erik Riis: *Offentlige myndigheders afskedigelse af uorganiserede chauffører*, [Public Authorities' Dismissals of Non-Unionized Drivers], UFR 1987 B, pp. 50 ff., at p. 54.

²² [Højesteret fandt ikke, at den europæiske menneskerettighedskonvention kunne anvendes direkte i denne sag. Det er vist yderst tvivlsomt, om en konvention, der endda er ældre end grundloven fra 1953, kan tillægges betydning ved fastlæggelsen af indholdet af forfatningen. Hertil kom, at lov nr. 285 af 9. juni 1982 om beskyttelse mod afskedigelse på grund af foreningsforhold blev vedtaget for at opfylde konventionens artikel 11. Denne lov fandtes ikke at efterlade tvivl, som menneskerettighedskonventionen kunne bidrage til afklaring af.]

²³ Erik Riis, op.cit., p. 54, stated in more general terms regarding the position of international law in domestic *Danish* law: "The European Convention on Human Rights is a treaty which the *Danish* Government under the rules of international law is obliged to observe and fulfil. It is, however, not by a general statute transformed to form a part of the law applicable in this country. The significance of the Convention on the laying down of the law applicable in this country is, accordingly [...] as a starting point solely that the domestic law, if it is ambiguous, shall be interpreted in the way which best brings it into line with international law, and that the courts by and large must be entitled to assume that it has not been the intention of the Government and the *Folketing* to lay down rules which would be contrary to *Denmark's* international obligations and hence to entail the State's responsibility under international law.

In a recent article Professor Claus Gulmann has put forward the view that "... these legal writers [in favour of regarding international law as a source of law in domestic law] reveal, in my opinion, a correct tendency to give also non-incorporated treaties a stronger position in *Danish* law than the one which possibly follows from a strict application of the criteria mentioned by Erik Riis", cf. Gulmann (1988), p. 288.

[Den europæiske menneskerettighedskonvention er en traktat, som den danske regering efter folkerettens regler er forpligtet til at overholde og opfylde. Den er imidlertid ikke ved generel lov transformeret til at udgøre en bestanddel af den her i landet gældende nationale ret. Konventionens betydning ved fastlæggelsen af den her i landet gældende nationale ret er herefter... som udgangspunkt alene, at den nationale ret ret, hvis den er tvetydig, skal fortolkes på den måde, der bedst bringer den i overensstemmelse med folkeretten, og at domstolene i det hele taget må være berettigede til at antage, at det ikke kan have været regerings og folketings hensigt at fastsætte regler, der ville stride mod Danmarks internationale forpligtelser og dermed påføre staten et folkeretligt ansvar.]

[Der er hos flere af forfatterne en, efter min mening, rigtig tendens til at give også ikke-incorporerede traktater en stærkere stilling i dansk ret end den, der måske følger af en strikt anvendelse af de kriterier, som nævnes af Erik Riis.]

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Thus, it seems that the *Højesteret* was of the opinion that the Act on Protection against Dismissals on the Grounds of Association Relations should be considered as a *partial* incorporation of the Convention into domestic law, and that there was no conflict between the Convention and the domestic statute.²⁴ Since it was found that this statute did not give rise to any doubt as to its interpretation, strictly speaking it is only natural that the decision should have been based on the domestic legal rule, insofar as it was not assumed that the domestic provision was contrary to the Convention.²⁵

The case was later brought before the European Commission of Human Rights which declared it inadmissible because the bus drivers could not be regarded as "victims" within the meaning of the Convention.²⁶ This was the case both in relation to the claim for reinstatement and the claim for greater damages. On the one hand, the Commission considered the possibility of obtaining damages in certain cases as an effective remedy against an infringement of the individual's rights under the Convention. On the other hand, the Commission insisted that damages are not always a sufficient remedy if the Member States have not taken proper measures in order to fulfil its obligations under the Convention. Since the available circumstances made it unlikely that it was general practice that public authorities disregard their obligations under the Act on Protection against Dismissals on the Grounds of Association Relations and solely pay damages, the Commission found that *Denmark* had adopted proper measures to fulfil its obligations under Article 11 of the Convention.

Erik Riis' statement that "... it is probably very doubtful whether significance can be ascribed to a convention that is even older than the 1953 Constitution in the laying down of the contents of the Constitution" does not reflect the general conception of law in this field, nor is it supported by judicial practice. Thus this view seems, as the Director of the *Danish Center of Human Rights Lars Adam Rehof*, has put it "... to presuppose a *new* variant of the rule of interpretation, according to which this rule should not be applicable to constitutional provisions or other rules of a constitutional character".^{27,28}

²⁴ Cf. Peter Germer: *Indledning til folkeretten* [Introduction to Public International Law], Copenhagen (1989), p. 67.

²⁵ Frederik Harhoff, *op.cit.*, p. 82, criticizes the decision strongly for not taking the Convention properly into account.

²⁶ Application No. 12719/1987.

²⁷ [Synspunktet synes at forudsætte en ny variant af fortolkningsreglen, hvorefter denne regel ikke skulle kunne finde anvendelse på grundlovsbestemmelser eller andre regler af forfatningsmæssig karakter.]

²⁸ Cf. Lars Adam Rehof: *Afskedigelse som menneskerettighedsproblem* [Dismissal as

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It was hardly the intention of the fathers of the 1953 amendment of the *Danish Constitution* that the Constitution in *Denmark*, "which" - as emphasized by the Minister of Foreign Affairs in the *Folketing* in connection with obtaining the consent of the *Folketing* to the ratification for the Convention - "so clearly professes the principles of which the Convention is the expression", should deviate from the Convention.²⁹ Besides, in this case there was no conflict between the Convention and the Constitution. Finally, *Erik Riis'* view is in clear contrast to the *Norwegian Høyesterett's* judgment in NRT. 1966.935 (see *infra* section 8.4) and the *Swedish Högsta Domstolen's* judgment in NJA 1981.1205 (see *infra* section 7.2) and NJA 1989.131 (see *infra* section 8.3) in which it was stated that the Convention is an important means of interpretation of the national constitutions.

5.2.2. Incorporation through Administrative Action.

In some cases it is not necessary to incorporate treaties by passing legislation; the incorporation can be carried out solely by an administrative act. This can be possible due to already existing statutory authorization in which the administration is empowered to conclude treaties and to incorporate them into domestic law by issuing administrative regulations. In other cases the authorization is provided for directly in the government prerogatives listed in the Constitution. Should divergences or conflicts between the treaty and the administrative regulations emerge, they must be solved on the basis of the principles relating to the cases in which the treaty is incorporated into domestic law by statute. The arguments outlined above have the same validity in relation to incorporation through an administrative act as through legislation.

This view is clearly expressed in a *Danish High Court* decision in UfR 1970.885 in which the defendant argued that an administrative regulation, issued pursuant to authorization in a statute which incorporated binding resolutions of the United Nation's Security Council concerning economic sanctions against Rhodesia, did not have the sufficient statutory authority. The Court turned down this view stating that, through its membership of the United Nations, *Denmark* was obliged to follow the binding resolutions of the Security Council and, since the regulation was based on such a binding resolution, it must be considered applicable.

In chapter 9, it will be discussed whether, and if so, to what extent and in

Human Rights Problem], UfR B 1987, pp. 193 ff., at p. 197.

²⁹ Cf. RT 1952-53, *Folketinget*, col. 1389.

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what situations administrative authorities not only may, but also should include treaties (international law) in the exercise of their discretionary powers.

5.2.3. Tentative Conclusions.

When a treaty is incorporated into domestic law by being reformulated in a statute, the treaty itself is an important factor in the interpretation of the statute, unless it is *clearly indicated* that the Legislature has deliberately intended not to incorporate the treaty completely. This appears clearly from a number of *Danish* cases. Although this question is not seen to have appeared before *Norwegian* and *Swedish* courts, there can be no doubt that these courts will follow the line laid down by the *Danish* courts in this field. It is especially in this context that the *principle of presumption* is applicable. The *travaux préparatoires* of statutes, generally speaking, have a very strong and a more or less similar impact on the interpretation of statutes in the *Scandinavian* countries. This applies also to treaties which are incorporated into domestic law by an administrative act; they should be regarded as an important part of the *travaux préparatoires*, not only of the regulation itself, but also of the statute which empowers the administration to issue the regulation. The same must be assumed to apply to administrative regulations which are issued with the authorization of a Government prerogative as stated in the Constitution.³⁰

However, this applies not only to treaties. In *Scandinavian* law the *travaux préparatoires* of a statute carry considerable weight, especially if the wording of the provisions is unclear and ambiguous.³¹ But it is even possible to find examples in which the *Danish Højesteret* has overridden even clear provisions in a statute.³² From the cases discussed in this section it is difficult to conclude whether or not the treaties which have been incor-

³⁰ On this type of administrative regulation as a means of incorporating treaties, see Espersen (1970), pp. 217 ff.

³¹ In one of the most recent *Scandinavian* work on the sources of law, W.E. von Eyben (ed.): *Juridisk Grundbog* [Legal Fundamental Book], 4th edition, Copenhagen (1988), Vol. 1, p. 14, it is stated as regards *Danish* law that "if one purely statistically wants to illustrate the significance of the different sources of law, in recent time there is no doubt that the *travaux préparatoires* of statutes, the *motives*, occupy the first position."

[Hvis man rent statistisk vil illustrere betydningen af de forskellige retskilder, er der i nutiden næppe tvivl om, at lovbestemmelsernes forhistorie, *motiverne*, indtager en første plads.]

³² See, for instance, Preben Stuer Lauridsen, op.cit.

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porated into domestic law by a specific act have played a more prominent part in the interpretation of domestic law than *travaux préparatoires* do in relation to the application of "pure" domestic law.

CHAPTER 6

Conflicts between the European Convention and Domestic Law before Domestic Courts

6.1. Introduction.

As was seen in chapter 3, the ECHR has been *passively* incorporated into domestic *Scandinavian* law, *i.e.* the Convention does not possess the status of domestic law. Thus one might think that the number of cases in which a conflict between the Convention and domestic law have arisen would be overwhelming, but these have actually been surprisingly low if one considers that the Convention does not enjoy formal domestic status.¹ However, in several cases brought before the European Commission the Convention has not been invoked before the domestic courts.²

Furthermore, in spite of the "dualist" point of departure governing the application of international law in domestic law, laid down in the *principle of the supremacy of domestic law*, in *Scandinavian* law hardly any cases exist in which it is clearly held that, in the case of a conflict between the ECHR and domestic law, precedence should be given to domestic law. Similarly, as regards treaties other than the ECHR, in recent times only a few existing reported judgments can be viewed as examples of cases in which the domestic rule, in conflict with a treaty provision, prevailed over the treaty provision. However, some *Swedish* decisions from the 1970's contain statements which have subsequently been viewed as a judicial affirmation of the so-called *transformation theory* or even as constitutional of this theory.³ It shall, however, be argued, that these cases provide less authorization for the *transformation theory* than what is usually assumed in legal writings.

It follows from this practice that a preliminary, but not less important, question in this context is under what circumstances the courts establish that there is a conflict between the treaty provision and domestic law? Is it

¹ Justice Frants Thygesen: *Bestand und Bedeutung der Grundrechte*, EuGRZ 1978, p. 440, has explained this scarcity of cases involving human rights with the existence of the Ombudsmen in *Scandinavia*: "Er führt im Auftrage des Parlaments die Aufsicht über die Behörden um zu sichern, dass die Grundsätze der gesetzmässigen Verwaltung befolgt werden."

² Cf. Sztucki (1986), p. 225.

³ See Sundberg (1988/2), p. 411.

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possible to point at some criteria which the courts apply when deciding whether or not there is a conflict between the ECHR and domestic law in the case at issue.

In order to attempt to answer these questions, in this chapter the cases in which (1) the courts have established that in the case at issue there is a conflict between the ECHR and domestic law and, on the other hand, (2) cases in which the courts have explicitly stated that there exists no such conflict will be analyzed. Between these two extremities there is, of course, a middle ground in which the courts apply the Convention as a means of interpretation or directly (under the presumption that the Legislature did not want to legislate contrary to the Convention had it been aware of the divergence or conflict). The latter situations will be discussed in chapters 7 and 8.

The aim of this analysis is threefold. First, in section the extent to which the courts have in fact let domestic law prevail over the ECHR and other treaties in their case-law will be described. To what extent does court practice reflect the traditional "dualist" view on the relationship between treaties and domestic law laid down in the *principle of the supremacy of domestic law* or - in Swedish terminology - the *transformation theory*? Second, in section 6.3, the case-law at the opposite end of the scale where the courts have explicitly stated that, in their view, there is no conflict between the ECHR and domestic law in the case at issue will be examined and discussed. In other words, what is implied in ascertaining that no conflict exists between the ECHR and domestic law? Is such ascertainment just a way of avoiding taking a stand on how a conflict between the Convention and domestic law should be resolved, or is it in itself a direct application of the Convention in domestic law? Third, in section 6.4, on the basis of the available case-law regarding the extremities in this context, it will be considered whether the available case-law provides a sufficient basis for formulating some general criteria governing, or at least influencing, the courts' decisions in establishing whether or not there is a conflict between the ECHR and domestic law.

6.2. Establishing a Conflict between the European Convention and Domestic Law: Domestic Law prevails.

UfR 1974.263 is an example of a case in which it was considered *clearly indicated* that the Legislature did not want to implement the provisions of a treaty completely into domestic law. In the case at issue the question was

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whether a claim for the damage of goods should be judged on the basis of section 65 of the *Danish Road Traffic Act* or on the basis of a more recent provision of the *CMR Act* (Act No. 47 of 10 March 1965). In the *travaux préparatoires* of the relevant section of the *CMR Act*, attention had been paid to the fact that fulfilment of the *CMR Convention* would require an amendment to section 65 of the *Road Traffic Act*. A provision relating to this in the draft bill was omitted when the bill was introduced because, as it is said in the explanatory memorandum accompanying the bill, "... this provision rightly belongs under the *Road Traffic Act* and will be included in a subsequent amendment of this Act"⁴.

The *Østre Landsret* stated that it was not *sufficiently clear from the genesis of the CMR Act* that the implementation of this statute meant that the provisions in section 65 of the *Road Traffic Act* should cease to apply to the liability of the carrier. Accordingly, the case was decided on the basis of section 65 in the *Road Traffic Act*.

The decision is remarkable, since it appears to be the only recent case in which a *Danish court* has explicitly *acknowledged the existence of a conflict between a treaty and a domestic Danish provision*.⁵ The High Court chose to resolve the conflict in favour of the domestic provision which, in view of the *travaux préparatoires* of the *CMR Act*, hardly comes as a surprise. Had the provision in the *CMR Act* been applied, the provision in section 65 of the *Road Traffic Act* would have been deprived of its real substance as regards international road transport.⁶ On the other hand, the Government had announced that it would try to bring the domestic legislation into line with the *CMR Convention*. Thus, one could claim that there was a real presumption that the Legislature would not legislate in a manner that was contrary to the *CMR Convention*. This may be interpreted as meaning that the *rule of presumption* is not applicable in cases where the international rule would infringe upon a contemplated reformulation of it in a domestic statute.⁷

In the *HT Case* in UfR 1986.898 (see *supra* section 5.2) the *Højesteret* did not find that the Act on Protection against Dismissals on the Grounds of

⁴ Cf. FT 1964/65, Tillæg A, col. 839.

⁵ Cf. Gulmann (1987), p. 33.

⁶ See Madsen (1986), pp. 39 f.

⁷ Cf. Zahle (1989), Vol. 2, p. 98.

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Association Relations was contrary to the ECHR, but stated nevertheless that the Convention could not be applied directly.

Against this background, it is remarkable that the *Højesteret* - as an *obiter dictum* - should refuse to review the compatibility of the domestic rule with the Convention in such relatively strong terms. The case did not give rise to any such statement. The *Danish Højesteret* has traditionally avoided making such strong statements on matters to which the case at issue did not give rise.⁸ It is obvious that this decision showed that the *Højesteret* sought to avoid being involved in the political dispute raging at that time, *partly* on the passing of the Act on Protection against Dismissals on the Grounds of Association Relations and *partly* on the very delicate question of freedom of association in the *Danish* labour market. Thus the *Højesteret* might have felt a strong need to emphasize that its decision was based solely on a domestic *Danish* provision. This is confirmed by the fact that in subsequent cases the Court has once more discussed the compatibility of domestic law with the Convention. Accordingly, this judgment certainly cannot be regarded as a precedent for the *principle of the supremacy of domestic law*.⁹

In a ruling of 1 November 1989¹⁰ the *Østre Landsret* held:

"Provisions of an international convention to which *Denmark* has acceded is not in itself part of valid *Danish* law, unless similar rules are found in *Danish* law or can be construed to be included herein. The question concerning the continued upholding of the *Danish* detention on remand should therefore be decided according to the rules of the Administration of Justice Act hereon..."¹¹

However, in its concrete application of the law the Court discussed the compatibility of the Convention with domestic law, and the Court reached the conclusion that there was no conflict between the Convention and upholding detention on remand, *i.e.* the Court's general statement on the application of the Convention in domestic *Danish* law is an *obiter dictum*. It should be

⁸ See Torben Jensen: *Domstolenes retsskabende, retsudfyldende og responderende virksomhed*, [The Courts' Law-Making, Law-Interpreting and Opinion-Giving Activity], UfR 1990 B, pp. 441 ff., at p. 443.

⁹ Cf. Zahle (1989), Vol. 3, pp. 236 f.

¹⁰ Case No. 17. afd. kære nr. 406/1989.

¹¹ [Bestemmelser i en af Danmark tiltrådt international konvention er ikke i sig selv bestanddele af gældende dansk ret, medmindre tilsvarende regler findes i dansk ret eller kan indfortolkes heri. Spørgsmålet om fortsat opretholdelse af den danske varetægtsfængsling findes derfor at måtte afgøres efter retsplejelovens regler herom.]

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noted that the very same day the *Høyesteret* decided the case in UfR 1990.13 (see *infra* section 8.4) in which it came the opposite result and accorded considerable significance to the Convention.

There exist no *Norwegian* decisions in which the courts have suggested that the ECHR, when conflicting with domestic law, should yield.¹² The *Høyesterett's* decision in NRt. 1957.942 seems to be the only *Norwegian* case in which it was held that domestic law should prevail over international law.¹³ An elderly German was engaged in carrying freight in a small vessel he owned. During the war his home was bombed and he took the remainder of his possessions on board his vessel. At the time of surrender in 1945 he was transporting coal along the *Norwegian* coast. After the surrendering he continued his transport activities in obedience to orders from the allied authorities. But in May 1946 the vessel was seized, the German and his wife forcibly removed and sent to Germany, allowed to take with them nothing but the clothes they were wearing. The man later brought a suit against the *Norwegian* State and, *inter alia*, claimed compensation for the chattels on board, including things like clothes, toilet articles, ordinary equipment, kitchen utensils, etc. The appropriation had been carried out in accordance with the *Norwegian* statute relating to enemy property, in which its definition of enemy property included with no possible exceptions chattels found in the Realm.

Both the *Byret* and a majority in the *Lagmannsrett* therefore found that they could not go beyond the clear provisions of the statute, but stated that it was desirable that the German should be indemnified by an *ex gratia* compensation for at least part of the loss. However, a single judge in the *Lagmannsrett* dissented. He first discussed the problem in relation to international law and found on the basis of an interpretation of the Regulations of Land-Warfare that the appropriation of the chattels was contrary to international law. He went on to discuss whether it was possible to subject the wording of the statute to certain general limitations the the aim of the statute. He found, however, that he must reject this approach. But he then continued:

"When, nevertheless, I remain of the opinion that the appropriation of Koppelman's chattels was not lawfully authorized, it is for the following considerations:

It seems to me a debasement of our Western culture that when recognized rules

¹² See Smith (1980), p. 310.

¹³ The case is discussed by Fleischer (1984), pp. 254 f.; Smith (1962), pp. 200 f.; Smith (1968), pp. 186 ff.; and Smith & Smith (1982), pp. 142 ff.

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of international law adopted with binding force in a convention are put to the test, they are swept aside as mere paper provisions. The courts must be especially on their guard in the extreme exceptional cases in which the result would be particularly unjust and objectionable - in order to safeguard as far as possible the cultural values that should be gained."¹⁴

The *Høyesterett* found, however, the wording of the statute conclusive, associating itself at the same time with the recommendation of an *ex gratia* indemnification.

Compared to the *Høyesterett*'s decisions in other cases deriving from the purge after the German occupation, the reasoning in this case is somewhat restricted *vis-à-vis* the application of international law.¹⁵ In particular, because one is here outside the scope of the *principle of legality*, an application of international law in favour of the German in such a way that the State should not have appropriated his chattels would not have violated the *principle of legality*.¹⁶ Given this lack of openness *vis-à-vis* international law, Professor *Carsten Smith* characterizes it as a "somewhat disappointing judgment".¹⁷

It cannot therefore be maintained, as a consequence of the practice laid down after the two world wars, that the Regulations of Land-Warfare offer any general protection to private enemy property in a hostile country.¹⁸ The appropriation in the case in question was more or less total, and in this case the courts seem at any rate to have gone to as far as possible in relation to what may be considered lawful under international law.¹⁹ Therefore, it is reasonable to wonder why in this particular case the courts found themselves unable to depart from the wording of the domestic statute, since (1) the outcome would give rise to grave doubts as to its lawfulness under interna-

¹⁴ Here cited in English from Smith (1968), p. 187.

¹⁵ However, two exceptions from the general open attitude *vis-à-vis* international law which in general characterizes the cases deriving from the German occupation are the judgments in NRt. 1945.13 and NRt. 1945.232. In these decisions one can find statements which may be viewed as support for the *principle of the supremacy of domestic law*, but these statements do not seem to have been decisive for the conclusions reached.

¹⁶ Cf. Fleischer (1984), p. 255.

¹⁷ Cf. Smith (1968), p. 187.

¹⁸ *Ibid.*; and Smith (1962), p. 201.

¹⁹ Helgesen (1982), pp. 43 f., expresses doubts as to whether the decision could be regarded as one in which the *Høyesterett* let domestic law prevail over international law.

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tional law; (2) the courts themselves found the result so unjust and objectionable that they recommended an *ex gratia* payment; and (3) in this claim the courts were indeed confronted with an exceptional case, since it was almost accidental that these articles were in *Norway* rather than in *Germany*.

In the *Case of Swedish Engine Drivers' Union*,²⁰ the *Swedish Engine Drivers' Union* claimed that the *Swedish National Collective Bargaining Office*, by refusing to conclude a new collective agreement with it, had not only violated certain sections of a 1936 Act regarding the right to organize and to negotiate, but also a number of international conventions including Articles 11, 13 and 14 of the ECHR. *Arbetsdomstolen* [the Labour Court] rejected this view. As regards the application of the invoked treaty provisions, the Court stated:

"With specific regard to the provisions of international agreements as touched upon earlier, it is the accepted view in *Sweden* that such provisions - insofar as they do not already have their counterparts in our legislation or customary law - do not become applicable *Swedish* law except through the medium of legislation. They can, however, clarify the meaning of laws enacted in *Sweden*, which must be assumed to be in conformity with *Sweden's* international undertakings. However, the submissions made in the case in this respect do not in any way cause the Labour Court to change its judgment of the question in dispute between the parties."²¹

Arbetsdomstolen's statements give rise to a number of questions as to its general interpretation of the law as well as its concrete application of it in the case at issue.

First, it seems as if the Court simply affirmed the *transformation theory*, but the reference to this as "the accepted view in *Sweden*" at that time is not convincing. In that period *Swedish* legal scholars were - and indeed to some extent still are - divided on the question of whether incorporation was needed before treaties could be applied in domestic law. The *transformation theory* first established itself as the prevailing view only subsequently, *inter alia*, as a consequence of *Arbetsdomstolen's* decision in this case. Moreover, it was formerly the view that treaties were directly applicable in domestic *Swedish*

²⁰ Reported in AD 1972, No. 5. The case is discussed by Almering (1973), pp. 786 f.; Danelius (1984), p. 56; Mamlöf & Mellqvist (1982), pp. 47 ff.; Sundberg (1988), p. 200; Sundberg (1988/2), p. 411; and Sztucki (1986), p. 226.

²¹ Here cited in English from Drzemczewski (1983), p. 139.

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law.²²

Second, the Court's statement that "... the submissions made in the case in this respect do not in any way cause the Labour Court to change its judgment..." indicates, on the other hand, that the Court in fact reviewed the compatibility of the invoked international conventions with domestic *Swedish* law.²³

Third, the Court affirmed the *principle of presumption* since, as it is stated in the judgment, international conventions "... can [...] clarify the meaning of laws enacted in *Sweden*, which must be assumed to be in conformity with *Sweden's* international undertakings."

Fourth, to the extent that this decision is viewed as authority for the *transformation theory*, it may further be questioned whether a decision from *Arbetsdomstolen* has any value as a precedent, insofar as the decision concerns a question which lies outside its competence proper. Although the *stare decisis* doctrine is not formally recognized in *Scandinavian* law, decisions from the highest instances are nevertheless regarded as having a considerable value as precedents. *Arbetsdomstolan* has only subject-matter jurisdiction in cases concerning labour law in which cases the ordinary courts, on the contrary, have no subject-matter jurisdiction. Since *Arbetsdomstolen* is thus not part of the normal court hierarchy, it is probably fair to assume that it cannot create precedents outside the field of labour law, *i.e.* its judgments cannot be precedents for the ordinary courts.²⁴ A further proof of this is that *Regeringsrätten* in RÅ 1974.121 (see *infra*) only referred to

²² Cf. SOU 1974: 100, p. 45 note 1, and Espersen (1968), pp. 260 f. See also the permanent under-secretary's statement in the explanatory memorandum accompanying a Bill on certain restrictions of the application of *Swedish* law and the authority of *Swedish* courts, in which it was stated: "That agreements on these parts has not been reflected in specific legislative measures must be explained by the fact that the agreements as such at the time of their origin were considered part of the legal regulation within the Realm. In this way of looking at things, the restriction on the application of *Swedish* law and the authority of the *Swedish* courts, which the immunity constitutes, should apply - and still exists - without the support of any other enactments than the provisions of the agreement", cf. Riksdagen, Proposition 1964:90.

[Att överenskommelser i dessa delar ej kommit att återspeglas i särskilda lagstiftningsåtgärder måste förklaras med att överenskommelserna såsom sådana vid tiden för deras tillkomst ansetts bli en del av den legala regleringen i riket. Med detta betraktelsesätt skulle den inskränkning i svensk lags tillämplighet och svensk domstols behörighet som immuniteten utgör gälla - och alltså bestå - utan stöd av andra stadgan än förskrifterna i överenskommelsen.]

²³ Cf. Almering (1973), pp. 786 f.; and Mamlöf & Mellqvist (1982), p. 48 note 88.

²⁴ Cf. Mamlöf & Mellqvist (1982), pp. 48 f.

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Högsta Domstolen's judgment in NJA 1973.423. Thus, *Regeringsrätten* apparently did not consider *Arbetsdomstolen's* decision a precedent.

Thus, both the *transformation theory* and the *principle of presumption* were, in general statements, emphasized by *Arbetsdomstolen*. However, in its concrete application of the law, the Court did not act in accordance with its general statements on the *transformation theory*, since it in fact reviewed the compatibility of the invoked conventions with domestic law, *i.e.* these general statements appear to be an *obiter dictum*.

The case was later brought before the European Court of Human Rights which (apparently) found *Arbetsdomstolen's* argumentation in conformity with the Convention. The Court referred to the above-cited statement and declared that "... a reading of the judgment of 18 February 1972 reveals that the Labour Court carefully examined the complaints brought before it in the light of legislation in force and not without taking into account Sweden's international undertakings".²⁵

In the *Sandström Case* in NJA 1973.423 *Högsta Domstolen* held that a retroactive clause in a collective agreement was not improper or unfair either in itself or in its specific application to the plaintiff.²⁶ This case concerned the legal validity and effect of a clause which was included in a collective agreement between the National Collective Bargaining Office and four federations of trade unions representing state employees, and which stipulated that increased salaries were not to be given retrospectively to members of trade unions who had been on strike during a part of the period of negotiations. Since the plaintiff was a member of a trade union which had been on strike and thus not a party to the agreement, he was not entitled to receive retroactive benefits in spite of the retroactivity clause provided in the collective agreement. Before the courts in all instances he made references to, *inter alia*, Articles 11, 13 and 14 of the ECHR.

Under the proceedings the Government pleaded that "... even if the Articles of the European Convention [...] are found to form a directly applicable *Swedish* source of law, they should not, as it appears from their

²⁵ Cf. Eur. Court H.R., *Case of Swedish Engine Drivers' Union*, Series A, Vol. 20 (1976), para. 50. The case is discussed by Olaf Bergqvist: *Sverige inför den europeiska domstolen i Strasbourg*, [Sweden before the European Court in Strasbourg], SvJT 1976, pp. 399 ff.

²⁶ The case is discussed by Almering (1973), pp. 787 f. (the *Kammarrätt's* judgment); Danelius (1984), p. 55; Malmlöf & Mellqvist (1982), p. 49 f.; Sundberg (1988), p. 200; Sundberg (1988/2), pp. 411 f.; and Sztucki (1986), p. 226.

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formulation, be considered applicable in this case".²⁷ Thus, the Government did not exclude the possibility of the Convention being directly applicable in *Swedish* law, even if this did not necessarily affect the outcome.

The *Tingsrätt* did not discuss the impact on *Swedish* law on the conventions referred to on *Swedish* law. The *Hovrätt* expressed itself in accordance with *Arbetsdomstolen* in the above-discussed case, *i.e.* it laid down that both the *transformation theory* and the *principle of presumption* were part of *Swedish* law. As regards the latter, the Court stated:

"This does not exclude that convention provisions, above all with regard to the text of a ratified convention, can fill a gap in the domestic law. This appears particularly natural when, as is the case with the European Convention on Human Rights, *Sweden* has even acceded to the Convention..." and recognized the competence of the European Court of Human Rights.²⁸

The *Hovrätt* did not find, however, that the said Articles of the ECHR should be interpreted as contended by Mr Sandström and, consequently, there was no conflict between the Convention and *Swedish* law.²⁹ *Högsta Domstolen* emphasized, on the other hand, only the requirement of transformation:

"Even if *Sweden* had assented to an international agreement, this would not be applicable for the state within the existing application of the law. To the extent that the agreement gives expression to principles which have not earlier prevailed here in this country, corresponding legislation ("transformation") will be necessary. Such legislation had, however, not been considered necessary when *Sweden* ratified the agreements referred to by Mr. Sandström. In that respect it should be noticed, that these agreements cannot be considered as having the content to which Mr. Sandström refers."³⁰

²⁷ [... även om artiklarna i Europakonventionen [...] finge anses utgöra en direkt tillämplig svensk rättskälla, skulle de för övrigt, såsom framgår av deras lydelse icke äga tillämpning i förevarande fall.]

²⁸ [Detta utesluter ej att konventionsbestämmelser framförallt då det gäller ratificerad konventionstext, kan verka till utfyllnad av den inhemska rätten. Säkilt framstår detta som naturligt när, såsom är fallet med Europarådets konvention angående mänskliga rättigheterna och de grundläggande friheterna. Sverige även biträtt konventionen.]

²⁹ Almering (1973), p. 788, has pointed out that the *Hovrätt's* decision was based on an independent interpretation of the invoked Articles of the ECHR so that the plaintiff was not left in a state of uncertainty as to what weight should be ascribed to the provisions of the invoked conventions. Moreover, Almering asserts that these provisions influenced the Court just as if they were domestic sources of law.

³⁰ Here cited in English from Drzemczewski (1983), p. 140.

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Since the *Hovrätt* had emphasized the *principle of presumption*, *Högsta Domstolen's* silence in this respect may be interpreted to mean that the Court dissociated itself from the *Hovrätt's* view that this principle was part of Swedish law. This is, however, probably not the case since the question at issue could undoubtedly have been resolved without giving a general statement on the *principle of presumption*. Similarly, it has been asserted that *Högsta Domstolen's* statement should be viewed as only concerning the *direct* application of the Convention, whereas the *Hovrätt's* statement concerned an *indirect* application of the Convention, *i.e.* the *principle of presumption*.³¹

The argumentation in the cited passage of the judgment is, however, not consistent. On the one hand, the Court stressed that transformation is necessary if a treaty is to have binding force in domestic law. On the other hand, it said that the invoked international agreements did not have the content which Mr Sandström claimed, *i.e.* the Court - apparently after having reviewed the compatibility of the invoked provisions of the Convention with Swedish law - was of the opinion that there was no conflict between international law and domestic Swedish law.³² In that case the emphasis on the need for transformation appears to be an *obiter dictum*, having therefore little value as a precedent. Similarly, *Högsta Domstolen's* possible dissociation from the *principle of presumption* also appears to be an *obiter dictum*.

Thus, neither this decision, nor the case of *Swedish Engine Driver's Union* can be viewed as absolute support for the *transformation theory*.³³

Regeringsrätten's decision in the *Råneå Case* in RÅ 1974.121 went one step further in its emphasis on the *transformation theory*.³⁴ The question before the Court was whether a municipal authority was under legal obligation to apply Article 2 of the First Protocol in a case in which the parents of a child had asked the local School Board to prohibit the display of posters containing any form of violence or sex.

Regeringsrätten did not assume that such a legal obligation on ad-

³¹ Cf. Sundberg (1976), p. 506.

³² Cf. Rolf H. Lindholm: *Mänskliga rättigheter i Sverige*, [Human Rights in Sweden], SvJT 1987, pp. 12 ff., at p. 16; Malmlöf & Mellqvist (1982), p. 50; and Melander (1984), p. 67.

³³ *Ibid.*, at p. 48.

³⁴ The case is discussed by Danelius (1984), pp. 55 f.; Malmlöf & Mellqvist (1982), pp. 50 ff.; Sundberg (1988), p. 201; Sundberg (1988/2), p. 412; and Sznucki (1986), p. 226.

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ministrative authorities existed:

"An international treaty to which Sweden has acceded is not directly applicable in the domestic application of justice in our country, but the legal principles which have been expressed in the treaty must, if required, be included in a corresponding Swedish law (transformation) before they become applicable law in Sweden. No transformation law corresponding to Article 2 of the Additional Protocol of 20 March 1952, to the Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms has been enacted. Consequently no obligation has been created for the School Board to observe the rules of the Additional Protocol in its activities."³⁵

The decision thus went as far as to suggest that administrative authorities should *not* be under legal obligation to exercise their powers with respect to Sweden's international undertakings, and it should undoubtedly be viewed as a judicial affirmation of the *transformation theory*.³⁶ It was subsequently heavily criticized in legal writings. Thus, Professor Jerzy Sztucki characterized the decision as "unique in its apparant indifference to the substance of the Convention";³⁷ Professor Lars Hjermer added that "... statements of the kind made in the Råneå Case (RÅ 1974.121) are, contrariwise, only likely to cause annoyance and should therefore be avoided";³⁸ and Professor Jacob W.F. Sundberg called the decision an "error of judgment".⁴⁰

The very sharp criticism to which this decision was subsequently subjected seems, as will be seen in the following chapters, to have made the Swedish courts rethink their attitude *vis-à-vis* the Convention.⁴¹

³⁵ Here cited in English from Sundberg (1988), p. 201.

³⁶ Cf. Rolf H. Lindholm, *op.cit.*, p. 16; and MalmLöf & Mellqvist (1982), p. 54.

³⁷ Cf. Sztucki (1986), p. 227.

³⁸ [Uttalanden som det i Råneåfallet (RÅ 1974.121) kan däremot blott väcka förargelse och borde därför undvikas.]

³⁹ Cf. Hilding Eek, Ove Bring & Lars Hjermer: *Folkrätten* [The Public International Law], 4th edition, Stockholm (1984), p. 261.

⁴⁰ Cf. Sundberg (1976), p. 506 note 44.

⁴¹ However, in *Bostadsdomstolen's* [the Housing and Tenancy Court's] judgment of 2 April 1984 (Case No. BD 547/83-04) it was decided to reject postponement of the decision of the case until the European Commission and Court of Human Rights had decided whether or not the Convention had been violated on previous stages of the proceedings.

Moreover, from the European Court of Human Rights' subsequent judgment in the case it appears that the applicant invoked Articles 6, 11 and 13 of the Convention before *Bostadsdomstolen* [the Housing and Tenancy Court], cf. Eur. Court H.R., *Langborger Case*, Series A, Vol. 155 (1989), para. 12. However, this does not appear from *Bostadsdomstolen's* [the

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6.3. Establishing that there is no Conflict between the European Convention and Domestic Law: follow the Line of least Resistance or apply the Convention directly?

In a number of cases it has been stated that, in the Court's view, there was no conflict between the ECHR and the way in which domestic law was applied. However, the extent to which the courts have discussed the relationship between the Convention and domestic law varies from case to case. This is undoubtedly due to the fact that in some cases the question of the compatibility of domestic law with the Convention was only one among many questions in the case, whereas in some recent cases this issue has constituted the actual dispute in question.

In UfR 1986.1080 two accused were sentenced 4 and 7 years imprisonment by the *Østre Landsret*, sitting with a jury, for, *inter alia*, attempted robbery. They pleaded before the *Højesteret* to have the sentence rescinded and remitted for retrial because a reading of evidence before the High Court, which prior to the High Court hearing had been given in the *Københavns Byret*, was contrary to Article 6(3)(d) of the Convention. The evidence was read before the High Court because the witness had died before the hearing. The *Højesteret* established that the reading of the evidence before the High Court could take place, *inter alia*, because the counsel for the defence had been present and had had the right to cross-examine the witness in the City Court, and that this was lawful under section 877(2)(3) of the *Danish Administration of Justice Act*. Then, it was stated that "... Article 6(3)(d) of the *European Convention on Human Rights* is not shown to have been encroached upon" (emphasis added).⁴²

The case seems to be the first in which the *Danish Højesteret* discussed the relationship between the Convention and domestic law explicitly. With this reference to the Convention, it must be presumed that the *Højesteret* wished to indicate that it had interpreted the Convention independently and then compared it with domestic *Danish* law. As mentioned earlier, the result was that it was not assumed that domestic law was incompatible with the Convention, but this is not the decisive point as regards the application of the Convention. Against this background, it is difficult to view the decision as

Housing and Tenancy Court's] own judgment in the case.

⁴² [... at Menneskerettighedskonventionens artikel 6, stk. 3, litra d, ikke ses at være tilsidesat.]

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anything other than a direct application of the Convention.⁴³ On the other hand, from the judgment nothing certain can be concluded on how the Court would have decided the case if it had assumed that there was a conflict between domestic law and the Convention.

Moreover, the decision is a good illustration of the point that the doubts in domestic law which are presupposed in the *rule of interpretation*, is sometimes due solely to the existence of international law. The interpretation of the domestic provision left no doubt; it was quite clear that the conditions for reading the evidence before the Court as laid down in section 877(2)(3) of the Administration of Justice Act had been fulfilled, since the request concerned the reading out of the (courts') records as well as the witness had died in the meantime. The doubt first emerged when the Convention was taken into account.⁴⁴

The willingness to review the compatibility of domestic law with the Convention was confirmed in UfR 1987.440, in which the *Højesteret's* Interlocutory Appeals Committee confirmed a decision made by the President of the *Østre Landsret*. In this case the President had assigned a counsel for the defence in a case where the accused himself had not been able to find a counsel who would plead the case within a reasonable time. Before the *Højesteret* the accused pleaded to have the assignment rescinded with reference to Article 6 of the ECHR. In a statement submitted to the *Højesteret*, the President of the *Østre Landsret* stuck to his original decision and added that "... Article 6(3)(c) of the European Convention on Human Rights cannot be considered infringed..."⁴⁵ (emphasis added) since the two counsels assigned to the accused were counsels who had often been assigned to accused by the State from a list of legal aid counsels, and furthermore they were willing to take the case on. Thus, this case must also be considered as a direct application of the Convention in domestic *Danish* law.⁴⁶ But again, it is difficult to say what the result would have been, had the Court found

⁴³ Cf. Holst-Christensen (1989), p. 50; and Asbjørn Jensen: *Incorporation of the European Convention Seen from a Danish Point of View* in Rehof & Gulmann (1989), pp. 161 ff., at p. 169.

⁴⁴ Cf. Zahle (1989), Vol. 2, p. 97.

⁴⁵ [... kan artikel 6, stk. 3, litra c, i Den europæiske Menneskerettighedskonvention ikke anses for overtrådt ved...]

⁴⁶ Cf. Asbjørn Jensen, *op.cit.*, p. 169.

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that there was a conflict between domestic law and the Convention.⁴⁷

The *Norwegian Høyesterett's* decision in NRt. 1954.478 is to a large extent very expressive of the reasoning of the *Norwegian* courts in cases in which there is a *potential* conflict between international law and domestic *Norwegian* law. In the case, contrary to section 5a of the *Norwegian* Whaling Act, a whaler had participated in a Dutch whaling expedition in the South Seas. Section 5a of the *Norwegian* Whaling Act prohibited *Norwegian* nationals from participating, directly or indirectly, in the whaling industry under a foreign flag. Consequently, in the *Byrett* he was sentenced for violating the Whaling Act. Before the *Høyesterett* he pleaded that a literal interpretation of the Whaling Act would, *inter alia*, conflict with *Norway's* international obligations *vis-à-vis* foreign states and especially the Netherlands. Justice *Berger*, speaking for a unanimous court on this point, discussed whether section 5a of the Whaling Act was contrary to international law but reached the conclusion that this was not the case. He continued "... [i]n my view, then, I do not need to deal with the question of the consequences of a statute being contrary to an obligation under international law."⁴⁸

In an extrajudicial comment on another case Justice *Gaarder*, *inter alia*, referred to the decision in NRt. 1954.478⁴⁹ and to an article by *Edvard Hambro* in which it was pointed out that the *Høyesterett* in this judgment had embarked on discussing international law:⁵⁰

"However, I would like to point out to Hambro that even when in this judgment the *Høyesterett* discussed *Norway's* obligations under a treaty and found that the Whaling Act was not contrary to such obligations, hardly proves more than under the circumstances this was the easiest conclusion to draw. The courts - as *Illum* [a *Danish* professor of law] has expressed it - generally follow the line of least resistance."⁵¹

⁴⁷ See also *Hillerød Kriminalret's* judgment of 19 June 1989 (Case No. 236/1988) where Article 8 of the Convention was not found applicable.

⁴⁸ [Jeg behøver etter mitt syn ikke å komme inn på spørsmålet om følgerne av at en lov kommer i strid med en folkerettslig forpliktelse.]

⁴⁹ Cf. Karsten Gaarder: *Fra den norske Høyesteretts praksis i 1954*, [From the Norwegian Supreme Court's Practice in 1954], TfR 1955, p. 535.

⁵⁰ Cf. Edvard Hambro: *Folkerettsanvendelse ved norske domstoler*, [The Application of International Law in Norwegian Courts], TfR 1955, pp. 48 ff., at p. 53.

⁵¹ [Jeg vil imidlertid til Hambro bemerke at når Høyesteret i denne dom har drøftet Norges traktatmessige forpliktelser og funnet at hvalfangstloven ikke stred mot noen slike forpliktelser, ligger heri neppe mer enn at dette etter omstendighetene var den snarreste veien til resultatet.]

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This is quite a remarkable statement. What Justice *Gaarder* is in fact saying is that it was easier to examine whether the disputed *Norwegian* statute was contrary to international law than to maintain that the Court at any rate should yield to *Norwegian* law, even though this is contrary to international law.⁵²

The first *Norwegian* case explicitly involving the ECHR was the *Iversen Case* in NRt. 1961.1350, which concerned the question whether a provision of a provisional act on compulsory civilian service for dentists violated Article 4 of the Convention. In the *Høyesterett* Justice *Hiorthøy*, speaking for the majority, ruled:

"It seems hardly doubtful to me that the prohibition in the Convention against subjecting anyone to perform "forced and compulsory labour" cannot reasonably be given such a wide construction that it includes instructions to perform public service of the kind in question here. The present case concerns brief, well-paid work in one's own profession in immediate connection with completed professional training. Although such injunctions may in many cases be in conflict with the interests of the individual as he sees them in the moment, I find it manifest that they cannot with any justification be characterized as an encroachment on, still less a violation of any human right. Accordingly, as I cannot see that there is any contradiction between the Convention and the *Norwegian* act in question, I need not enter into the question as to which of these shall prevail in the event of conflict."⁵³

Thus, the majority in the *Høyesterett* did not assume that there was any conflict between the Convention and domestic *Norwegian* law. Consequently, it did not need to consider how such a conflict should be solved.⁵⁴ On the other hand, it should be observed that the *Høyesterett* here considered the Convention as an important source of law in domestic law.⁵⁵

Similarly, in NRt. 1974.935 both the majority and the minority were, though on different premises, of the opinion that there was no conflict between the domestic provision and the Convention. The case concerned the

Domstolene plier jo - som Illum har uttrykt det - gjerne å hoppe over der hvor gjerdet er lavest.]

⁵² Cf. Smith & Smith (1982), pp. 169 f.

⁵³ Here cited in English from Drzemczewski (1983), p. 134.

⁵⁴ The case was later brought before the European Commission of Human Rights (Application No. 1468/62) which declared it inadmissible since it was found to be manifestly ill-founded.

⁵⁵ Cf. Trond Dolva: *Internasjonale menneskerettighetskonvensjoner og intern norsk rett*, [International Human Rights Conventions and Domestic Norwegian Law], TfR 1990, p. 129.

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question whether a mental patient could be a litigant within criminal procedure, or whether such a status belonged exclusively to the committee. The majority did not find that Article 6 of the Convention should be interpreted as pleaded by the plaintiff, and the minority was of the opinion that the domestic provision did not have the content which the State pleaded and, consequently, that there was no conflict with the Convention.

The compatibility of a provision of an act on pensions to seamen with Articles 14(7) and 26 of the UN-Covenant was discussed extensively by the *Høyesterett* in NRt. 1977.1207.⁵⁶ The Seaman's Pension Act was passed in 1948. Under the Act it was, as a general rule, possible to include terms of service prior to the adoption of the Act on the basis of which the pension was calculated. However, in section 23 of the Act it was laid down that this did not apply to seamen who had been convicted under the *Norwegian* legislation for collaborating with the enemy under the German occupation. In the case at issue, the plaintiff who had been convicted of violating of the legislation on collaborationism claimed that section 23 of the Seaman's Pension Act was contrary to the said provisions of the UN-Covenant.

Neither the *Byrett* nor the *Høyesterett* found that there was any conflict between the domestic provision and the invoked articles of the Covenant. Justice *Schweigaard Selmer*, speaking for a unanimous court, explained:

"I do not find either that there is any conflict between section 23(1) of the Seaman's Pension Act and the principles which are expressed in Article 14(7), laying down that no person shall be punished once more for the same count, and Article 26, laying down that the legislation shall prohibit any discrimination against, *inter alia*, "political or other views", of the UN's Covenant of 19 December 1966, ratified by *Norway* on 13 September 1972, on Civil and Political Rights. The application of the rule in section 23(1) in my opinion does not result in any additional punishment [...] Nor does the rule imply any discrimination on the grounds of political views. The exception from including terms of service prior to the Act's coming into force on the basis of which the pension is calculated applies to persons who have been convicted for certain serious crimes and regardless of the motivation behind the offences. It is not the political view that is the reason for the discrimination but the criminal act the person in question is guilty of. The principle of equality in Article 26 cannot be considered violated by such a rule which has also an objective basis."⁵⁷

⁵⁶ See also NRt. 1978.662 in which the compatibility of a domestic *Norwegian* provision, laying down criminal responsibility for failing to turn up for military service, with Article 14(7) of the UN-Covenant was discussed by the *Høyesterett*.

⁵⁷ [Heller ikke finner jeg at det foreligger noen motstrid mellom sjømannspensjonslovens § 23 første ledd og de prinsipper som er kommet til uttrykk i F.N.'s konvensjon av 19. desember 1966, ratifisert av Norge 13. september 1972, om sivile og politiske rettigheter

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In NRt. 1981.770, concerning commitment to a mental hospital, it was pleaded that the conditions within the mental hospital were so poor that they were contrary to the minimum standard laid down in Articles 7, 9 and 10 of the UN-Covenant. Though the *Høyesterett* admitted that the conditions within the hospital were not optimal, it did not, on the other hand, find that they infringed the Covenant.⁵⁸

The well-known *Alta Case*⁵⁹ in NRt. 1982.241 concerned the legality - partly under domestic *Norwegian* law and partly under international law, *inter alia*, Article 14 of ECHR and Article 1 of the First Protocol - of an administrative decision on the construction of a hydroelectric power station on the Alta river in an area inhabited by Sami people. As regards its relationship to the Convention (and the other invoked rules of international law), Justice *Christiansen*, speaking for a unanimous *Høyesterett*, sitting in plenum, established that there was no conflict between the domestic rules of law and the invoked international obligations (p. 299). However, previously in the judgment, he stated (p. 257 f):

"What I said about the limits of judicial review needs to be qualified. In the present case it has been argued that the Sami people are protected against such interferences with their interest as follows from the regulation of the Alta river by virtue of rules of international law which are binding upon *Norway*. The rules concerning the

artikkel 14 punkt 7 om at ingen skal kunne straffes på ny for samme forhold og artikkel 26 om at lovgivningen skal forby enhver forskjellsbehandling, blant annet på grunnlag av "politisk eller annen oppfatning". Anvendelsen av reglen i § 23 første ledd medfører etter mit syn ingen tilleggsstraf [...] Heller ikke innebærer regelen at noen forskjellsbehandles på grunn av sin politiske oppfatning. Unntaket fra å få medregnet, som pensjonsgivende fartsud før lovens ikrafttreden gjelder for personer som er straffedømt for visse alvorligere forbrytelser, og uansett motivasjonen for overtredelserne. Det er ikke den politiske oppfatning som begrunner forskjellsbehandlingen, men den forbryterske handling vedkommende har gjort seg skyldig i. Prinsippet om likebehandling i artikkel 26 kan ikke anses krenket ved en slik regel som også har sin saklige begrunnelse.]

⁵⁸ See also the *Høyesterett's* judgment in NRt. 1984.1359 where it was laid down that Articles 9 and 10 of the ECHR and Articles 18 and 19 of the UN-Covenant were not an obstacle for criminalizing discriminatory statements on homosexuals, and the *Høyesterett's* Appeals Committee's decisions in NRt. 1985.1444 and NRt. 1987.1285 in which the Committee, without entering into any discussion, stated that the provisions of the *Norwegian* Act of Criminal Procedure on detention on remand were compatible with Article 5(1)(c) of the Convention.

It should, however, be noted that the *Norwegian* Act of Criminal Procedure in section 4 (before 1 January 1986, section 5) contains a provision laying down that the Act should be interpreted with the reservations deriving from international law, *i.e.* the decisions concern, strictly speaking, questions which lie within the sphere of *sector-monism*.

⁵⁹ A brief account of the case can be found in Applications Nos. 9278/81 and 9415/81, cf. 35 D.R., pp. 30 ff. (see *infra* section 18.2).

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court's power to review the validity of administrative acts do not prevent the Court from fully and comprehensively considering whether the expansion works violate rules of international law [the Convention and the UN-Covenant]."⁶⁰

Since it was found that there was no conflict between the invoked conventions and domestic law, this statement is an *obiter dictum*. However, this may be interpreted as meaning that the *Høyesterett*, without actually having to do so, felt a stronger need to express its view on the relationship between human rights conventions and domestic *Norwegian* law than it had on earlier occasions. In this respect, one should note the very clear formulation "... do not prevent the courts from *fully and comprehensively* considering whether the expansion works violate rules of international law" (emphasis added). Normally, however, it is assumed that *Norwegian* courts are not entitled to review the administration's exercise of the so-called "free discretion". Thus the rules of international law do not form part of the "free discretion" which the administration itself controls. Consequently, *Norwegian* administrative authorities should be considered under a legal obligation to exercise their discretionary powers in such a way that their decisions conform with undertaken international human rights obligations.

One may wonder whether this decision contains further implications than the above-mentioned as to the domestic status of human rights conventions. Professor *Carsten Smith* has viewed "... this decision as the definitive breakthrough for the principle of the precedence of international law before *Norwegian* courts".⁶¹ It is, however, hardly possible to draw such a far-reaching conclusion from the decision since no conflict between the conventions and domestic law was actually recognized.⁶² But the decision certainly lays down that, though not in the traditional form of a precedent, the courts are entitled to review whether administrative decisions are lawful under

⁶⁰ Here cited in English from Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), para. 42.

⁶¹ [... denne avgjørelsen som det endelige gjennombrud for prinsippet om folkerettens forrang ved norske domstoler.]

⁶² Cf. Smith & Smith (1982), p. 229.

⁶³ Cf. Fleischer (1984), p. 256. See also Rainer Hofmann in EuGRZ 1985, p. 120, who concludes: "Sicherlich ist in dieser Aussage, die ohnehin eher als obiter dictum zu werten ist, kein Präjudiz für den Vorrang des Völkerrechts gegenüber nationalem Recht zu sehen. Dies gilt schon deshalb, weil das Gericht letztlich keine solche Verletzung annahm."

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human rights conventions.⁶⁴

In the *Høyesterett's* Interlocutory Appeals Committee's ruling of 16 March 1990⁶⁵ concerning the extension of security measures under section 39 of the Penal Code, the appellant submitted that the term of security measures could not be extended unless the convicted person has committed new criminal acts. This view was based on Article 4(1) of Seventh Protocol which came into force in *Norway* on 1 January 1989. According to Article 4(1) of the Protocol no person shall be "tried or punished" for a felony of which he has already been convicted. A remand in custody and security measures were deemed to be "punishment" within the meaning of the Protocol, and, it was submitted, section 39(3) of the Penal Code as well as section 171 of the Act of Criminal Procedure must be so interpreted that they conform with the Protocol. Moreover, the appellant invoked Articles 3 and 6 of the Convention itself.

The Interlocutory Appeals Committee unanimously explained that pursuant to section 39(3)(2) of the Penal Code the Court shall in deciding on security measures "... fix a maximum period beyond which precautions must not be applied without the consent of the Court". A decision to the effect that the term of security measures shall be extended does not mean that the convicted person in question is convicted or sentenced anew for the acts that provide the basis for the sentence of security measures. That these acts provide grounds for the application of preventive measures has already been decided by the sentence of security measures. Conclusive of the question whether the term of security measures shall be extended beyond the maximum period originally fixed will be an assessment of the other circumstances that justify the application of preventive measures, the convicted person's mental faculties and the risk of a repetition of criminal acts. That the term of preventive detention may be extended if reasons for so doing are found after such an assessment follows from the sentence of security measures in conjunction with the provision in section 39(3)(2). The Committee then continued:

"Accordingly, it does not appear that the High Court has relied on an erroneous interpretation of the provisions in Article 4, item 1, of Additional Protocol No. 7 of the European Convention on Human Rights in assuming that an extension of the term

⁶⁴ Cf. Helgesen (1982), p. 51.

⁶⁵ Case No. lnr 471/1990, jnr 289/1990.

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of preventive supervision [security measures] in accordance with section 39, item 3 second paragraph, of the Penal Code is not contrary to the provision of the Convention.

Nor does it appear to the Interlocutory Appeals Committee that the High Court's decision is based on an erroneous interpretation of Articles 3 and 6 of the Convention on Human Rights."⁶⁶

In two decisions of 29 March 1990⁶⁷ the *Høyesterett* found that the reading of evidence in the form of the police's reports containing the interrogation of two witnesses was in accordance with Article 6(1) and (3)(d) of the Convention and in particular the judgments of the European Court of Human Rights in the *Unterpertinger Case*⁶⁸ and the *Kostovski Case*.⁶⁹ Both rulings discussed in detail how the judgments should be interpreted, as well as it being *per se* taken for granted that domestic *Norwegian* law should be interpreted in such way that it conform with the Convention. In the first case, to which reference was made in the second, Justice *Gjølstad*, speaking for a unanimous court, held:

"In the evaluation of the weight of the different elements it is in my opinion of significance to look at what follows from the Human Rights Convention in relation to the convicted person's right to question witnesses. It is a generally accepted starting point that *Norwegian* law must be presupposed to be in accordance with treaties by which *Norway* is bound."⁷⁰

After having discussed the *Unterpertinger* and the *Koskovski Cases*, the Justice concluded:

"The views which the judgments are expressive of harmonize well in my opinion with a reasonable understanding of the principle of proportionality set forth in section 297 of the Act of Criminal Procedure in the light of which principles our criminal procedure is founded. If it concerns a wholly central witness, whom it is possible to question before the hearing court, the consideration for the defendant's legal rights

⁶⁶ Here cited in English from Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), Doc. Cour (90) 64 rev.

⁶⁷ Case No. lnr 48B/1990, snr 266/1989, and Case No. lnr 49B/1990, snr 303/1989.

⁶⁸ Cf. Eur. Court H.R., *Unterpertinger Case*, Series A, Vol. 110 (1987).

⁶⁹ Cf. Eur. Court H.R., *Kostovski Case*, Series A, Vol. 166 (1989).

⁷⁰ [Ved vurderingen av de forskjellige momenters vekt er det etter min mening av betydning å se på hva som følger av Menneskerettighetskonvensjonen når det gjelder domfeltes rett til å eksaminere vitner. Det er et akkjemmelig akseptert utgangspunkt at norsk lov må forutsettes å være i samsvar med traktater som Norge er bundet av.]

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should frequently be given priority over the cost of the expenses and inconveniences by an adjournment of the case."⁷¹

In the cases at issue it was found that the reading of a police report containing a statement of one out of seven witnesses to a traffic accident, and the refusal of a new interrogation on the initiative of the counsel for the defence of a child in a case concerning a sexual crime respectively, did not violate Article 6 of the Convention. Consequently, there was no conflict between the Convention and domestic law which the Court had to resolve.

As mentioned, the very sharp criticism to which *Regeringsrätten's* decision in the *Råneå Case* in RÅ 1974.121 was subsequently subjected seems to have made the *Swedish* courts rethink their attitude *vis-à-vis* the ECHR.

Thus a first step in that direction was probably *Regeringsrätten's* decision in RÅ 1981 2:14 in which the Court seems to have dissociated itself from its previous strong statements on the relationship between the Convention and domestic law in the *Råneå Case*. In this case some parents lodged a complaint that the Stockholm School Board had decided that the pupils in the primary schools in Stockholm were obliged to stay in school in addition to the normal teaching hours in order to participate in other activities. This was, according to the parents, neither lawful under the Instrument of Government nor under Articles 8 and 14 of the Convention. On the impact of the Convention on *Swedish* law, the County Government Board of Stockholm, which decided the case in the first instance, repeated literally *Regeringsrätten's* statements in the *Råneå Case*. *Regeringsrätten* discussed, on the other hand, whether domestic law and the way it was applied in the case at issue was compatible with the Convention and concluded that there was no conflict between domestic law and the Convention. However, no general statements on neither the *transformation theory* nor the *principle of presumption* were made.⁷² As will be seen in chapters 7 and 8, in subsequent cases the *Swedish* courts have again turned towards a more open attitude *vis-à-vis* the

⁷¹ [De synspunkter dommene gir uttrykk for, harmonerer etter min mening godt med en rimelig forståelse av forholdsmessighetskriteriet i straffeprosesslovens § 297 i lys av de prinsipper også vår straffeprosess bygger på. Hvis det dreier seg om helt sentrale vitner, som det er mulig å føre for den dømmende rett, må hensynet til tiltaltes rettssikkerhet regelmessig slå igjennom i forhold til utgifter og ulemper ved en utsettelse av saken.]

⁷² See also RÅ 1978:2 in which one of the judges, in his concurring opinion, considered whether domestic law conformed with Article 6 of the International Convention on the Elimination of all Forms of Racial Discrimination.

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Convention.

In the *Kammarrätt's* judgment of 31 October 1988⁷³ in the third set of proceedings challenging the prohibition on removal of the child from her foster parents to the biological mother in the *Eriksson Case*,⁷⁴ it was held that there was no violation of either the mother's nor the child's right to family life under Article 8 of the Convention. This interpretation proved later to be wrong since the European Court held that there had been a violation of Article 8 of the Convention. The *Länsrätt*, which decided the case in the first instance⁷⁵, explained its application of the Convention in a very illustrative way:

"In Sweden the system is applied that the Court on the first hand seeks guidance in the wording of the Act. If the wording of the Act does not give any answer to the case at issue, the *travaux préparatoires* and legal practice may assist. If neither of these nor any other domestic source of law give requisite guidance, then the question of the significance of the European Convention on Human Rights arises.

It is not the question whether the *Länsrätt*, from the Convention or principally the case-law which in connection thereto the Strasbourg Court has developed, should include new legal rules in Swedish law. Instead it is a question to what extent the *Länsrätt* should observe the weight of the grounds on which the decisions in similar disputes before the European Court have been based. As regards the Swedish doctrine on the sources of law and the so-called transformation theory this involves, on the one hand, that to the degree the grounds of such decisions conflict with Swedish law, it is the Swedish Legislature which is given a pointer as to which measures should be taken regarding Sweden's commitment to the Convention. On the other hand, this implies that the grounds of a decision that is not contrary to Swedish law, laid down with assistance of the Swedish doctrine of sources of law, may be observed when a Swedish court is deciding a similar case. The Convention may, therefore, fill the Swedish sources of law when the Swedish sources of law no longer provide guidance."⁷⁶

⁷³ Case No. 4050/4051-1988.

⁷⁴ Cf. Eur. Court H.R., *Eriksson Case*, Series A, Vol. 156 (1989).

⁷⁵ Judgment of 15 June 1988 (Case No. Ö 1257-87/Ö 1376-87).

⁷⁶ [I Sverige tillämpas den ordningen att domstolen i första hand söker ledning i lagtexten. Om lagtexten inte ger svar för det särskilda fallet så kan förarbeten och rättspraxis vara behjälpliga. När inte heller dessa eller andra inhemska rättskällor ger erforderlig vägledning uppkommer numera fråga om Europakonventionens betydelse som nationell rättskälla.

Det är inte fråga om att länsrätten utifrån konventionen, eller främst den rättspraxis som domstolen i Strasbourg i anslutning därtill utvecklat, skall intolka nya rättsregler i den svenska rätten. Det är istället fråga om i vilken utsträckning länsrätten bör beakta tyngdan av de skäl som legat till grund för avgöranden av liknande tvister i europadomstolen. Med hänsyn till den svenska rättskällelären och den s k transformationsteorin innebär detta å den ena sidan att i den mån skälen vid sådana avgöranden strider mot den svenska rätten så är det den svenske lagstiftaren som getts en pekepinne om vad som bör åtgärdas med hänsyn till Sveriges

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However, the fact that the *Länsrätt* did not consider decisions from the European Court of Human Rights as precedents proper in domestic law is probably not correct, since *Högsta Domstolen* in the subsequent judgment in NJA 1988.572 has in fact regarded a decision from the European Court as a precedent in domestic law (see *infra* section 8.4).

6.4. Tentative Conclusions.

No reported *Danish* or *Norwegian* case-law exist in which it is established that in the case at issue there is a conflict between the ECHR and domestic law. Consequently, *Danish* and *Norwegian* courts have avoided taking a stand on how a conflict between the Convention and domestic law should be resolved. This applies also to the *HT Case*, although the judgment contains *obiter dicta* statements which could be interpreted in the opposite way. On the contrary, *Danish* courts have, though without phrasing it in explicit terms of a conflict, on at least two occasions, in effect, let the Convention prevail over domestic *Danish* law.⁷⁷ The cases concerning treaties other than the ECHR do not give much guidance as to how the courts should resolve conflicts between the Convention and domestic law. It may be deduced from UfR 1974.263 that the *rule of presumption* is not applicable in cases where the international rule would infringe upon a contemplated reformulation in a domestic statute. But this situation is not likely to take place frequently. Nor does the case in NRt. 1957.942 give much guidance in this respect since the circumstances were indeed extraordinary, and it is also disputable whether or not there was actually a conflict between international law and domestic law in the case.

The three *Swedish* cases discussed in section 6.2 have subsequently been viewed as a judicial affirmation of the *transformation theory*.⁷⁸ However, only RÅ 1974.121 can be viewed as a clear precedent for the *transformation theory*.⁷⁹ Although the judgments in the *Swedish Engine Drivers' Union*

konventionsåtagande. Å andra sidan innebär detta att skälen för ett avgörande som inte strider mot den svenska rätten, bestämd med hjälp av svensk rättskälllära, kan beaktas när en svensk domstol har att avgöra ett liknande fall. Konventionen kan därför i vissa fall utfylla de svenska rättsreglerna när de svenska rättskällorna inte längre lämnar vägledning.]

⁷⁷ See the *Københavns Byret's* judgment of 25 April 1966 (see *infra* section 8.2.2) and UfR 1990.13 (see *infra* section 8.4).

⁷⁸ See, for example, Danelius (1984), p. 56; and Sztucki (1986), p. 227.

⁷⁹ Cf. Malmjöf & Mellqvist (1982), p. 56.

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Case and NJA 1973.423 contain *obiter dicta* statements in favour of the *transformation theory*, these statements cannot under the generally accepted *Scandinavian* doctrine on the sources of law be considered as having much, if any, value as precedents.

Consequently, in *Scandinavian* law there exists only *one* case in which the courts, in the case of a conflict between the Convention and domestic law, have made domestic law prevail over the ECHR. This is quite remarkable and can certainly not be regarded a proper judicial affirmation of the traditional "dualist" approach to the question of the relationship between international law and domestic law embodied in the *principle of the supremacy of domestic law* which has been set forth in legal writings.

On the contrary, in a number of cases it is held that there is no conflict between domestic law and the Convention as interpreted by the Court. Reaching such conclusion presupposes that the Court has interpreted the Convention independently and then compared this interpretation with domestic law. Under a "dualist" system, strictly speaking, such a laying down that in the case at issue there is no conflict between the Convention and domestic law would seem unnecessary. However, on the basis of the case-law discussed in section 6.3, there can be no doubt that the courts prefer to pass judgments from which it appears that they have actually considered the relationship with the ECHR. From an analytical point of view this establishment of conformity of domestic law with the Convention may undoubtedly be regarded as a direct application of the Convention, because the Convention in such cases has formed an integrated part of the Court's reasoning. In other words, the Convention has been applied as a *source of law*. However, this does not exclude that the courts from time to time base their decisions on an interpretation of the Convention which subsequently proves to have been erroneous and is overruled by the European Commission or Court of Human Rights.

This leads to another, and in this context more interesting, question: What weight should be accorded to the Convention as a domestic source of law? It shall not be attempted to answer this question here since the case-law discussed in this chapter does not provide sufficient information in this respect. The question will be discussed further in chapters 7, 8 and 10.

Finally, one may ask whether or not it is possible, on the basis of the discussed case-law to formulate some criteria governing when the courts prefer to establish that there is a conflict between the Convention and

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domestic law and when this is not the case.

With the *Råneå Case* as an exception, it is manifest *that the courts do not recognize conflicts between the Convention, as they interpret this, and domestic law*. Consequently, they can avoid and have actually avoided taking a stand on how such conflicts should be resolved.

It is, on the other hand, difficult to find any specific reasons which made *Regeringsrätten* refuse to pay attention to the Convention in the *Råneå Case*. Apart from an emerging tendency in legal writings to accept and put forward the *transformation theory* as valid law, there was no specific criterion which seems to have influenced the Court decisively in this respect.

However, the fact that it was explicitly stated in the *travaux préparatoires* to the CMR Act that the Legislature had been aware of the potential conflict between the CMR Convention and domestic *Danish* law may explain why the Court chose to let the domestic provision prevail in UfR 1974.263. In other words, it was *clearly indicated* that the Legislature (for the time being) did not want to fulfil the treaty obligation completely.

CHAPTER 7

The European Convention as a Means of Interpretation

7.1. Introduction.

It follows from the *Scandinavian* concept of a *source of law* that factors of a general nature on which the Court shall or may rely when deciding a case are considered *sources of law*. Accordingly, insofar as international law is in the process of influencing the courts - be it as a means of interpretation or by a direct application - it may be considered to be a source of law. However, as mentioned in section 2.4, in common usage the concept *source of law* is probably applied in a more narrow sense.

Based on *practical considerations* the available case-law is divided into cases in which international law is either applied as a *means of interpretation* relating to the domestic rule of law or where it would be more appropriate to talk about a *direct application* of international law in general, and the ECHR in particular; there is no sharp delimitation between these two "ways" of applying international law. The latter cases will be discussed in chapter 8. It should, however, be stressed that this distinction serves no analytical purposes. Under the definition of *sources of law* employed in this study it would from a analytical point of view *per se* be impossible to make such a distinction.

The *principle of presumption* lays down that, if domestic law provides for more than one interpretation, the interpretation that will best comply with international law should be preferred. Furthermore, domestic law is *presumed* to be compatible with international law, that is to say, the law-enforcing authorities may act on the presumption that the Legislature did not intend to legislate contrary to undertaken international obligations. The aim of this principle is, of course, to avoid accidentally infringing international law. Thus the *principle of presumption* applies primarily to situations in which international law lays down clear requirements on domestic law. However, as pointed out by Professor *Carsten Smith*, there also exists a more positive interaction between international law and domestic law in the choice between several solutions valid under international law: "the influence of international law is not limited to providing a justification for the elimination of certain

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solutions".¹

Although the majority of cases in this chapter does not concern the ECHR, the discussed case-law is nevertheless relevant in connection with the application of the ECHR. First, the cases show that the courts are open to arguments deriving from international law and, accordingly, also from the ECHR. Second, generally speaking, the international instruments applied in the cases at issue must be assumed to be of a character less strong than the ECHR (see *infra* section 10.2). Accordingly, there are reasons to believe that the courts will pay at least as much attention to the Convention as they have paid to the treaties which were relevant in the cases to be discussed.

7.2. International Law lays down Clear Requirements on Domestic Law. The classic example of the application of international customary law in Denmark is the decision in UfR 1942.1002 where the Østre Landsret upheld an order from the Court of Execution that refused to undertake an interim injunction ["*arrest*"] of a ship which belonged to the Russian state-owned shipping company and was therefore the property of a foreign state. Unlike the Penal Code, the Danish Administration of Justice Act contained, and still contains, no provision to the effect that it should be applied with the necessary reservations deriving from international law. Likewise, in NRt. 1938.584 the Norwegian Høyesterett's Interlocutory Appeals Committee annulled an interim injunction of a ship referring to the rules of international law relating to the immunity of state ships, despite the fact that these rules were not incorporated into domestic Norwegian legislation at that time.² On that occasion the Committee stressed strongly that domestic Norwegian law must be presumed to conform with the rules of international law. In NJA 1942.65 the Swedish Högsta Domstolen has likewise held this view.

In UfR 1979.332 the question was whether a provision of the CMR Act which incorporated the CMR Convention into domestic Danish law, should

¹ Cf. Smith (1968), p. 160.

² The Court referred to a convention on immunity of state vessels which at the time of the decision had only been signed but neither ratified nor implemented by any Norwegian statute. This reference to the treaty should probably be regarded as a link in the justification for establishing a general international norm.

In NRt. 1908.749 the Byrett dealt with a dispute which had arisen between the captain and one of his crew. The Høyesterett annulled this decision by referring to an assumed prevailing international custom that disputes arising on ships abroad cannot be brought before the Court of the foreign State but lie within the jurisdiction of the national consular representation on the spot.

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prevail over a provision of the Promissory Notes Act as regards rates of interest in cases where an action had been brought before the Court. In its decision the *Højesteret* emphasized that the provision of the CMR Act was "... *elaborated in accordance with an international convention*" (emphasis added)³ and ruled, consequently, that the provision of the CMR Act should prevail.

In an editorial note on the case, reference was made to the explanatory memorandum accompanying the bill amending the Promissory Notes Act. Since the *travaux préparatoires* did not *clearly indicate* that the Legislature consciously intended to overrule the provision of the CMR Convention, the case was decided on the basis of the *older*, but *special* provision of the CMR Act, i.e. according to the *lex specialis principle*, but contrary to the *lex posterior derogat legi priori principle*.⁴

In a recent judgment of 15 October 1990 in a case concerning the reading of evidence under the trial pursuant to section 877(3) of the Administration of Justice Act, the *Højesteret* held that "... the *Højesteret* concurs that the reading of the explanation given in court and of the letter, at least under these circumstances, was not contrary to section 877(3) of the Administration of Justice Act, *thus as this provision must be interpreted with regard to Article 6(3)(d) the [European] Convention on Human Rights*" (emphasis added).⁵ "These circumstances" were that the woman who had been questioned in court under the preliminary examination had died before the trial. The letter had been written to a friend and touched upon the case. Neither the explanation given in court nor the letter were considered as main evidence in the case. Moreover, the value as proof of both the explanation and the letter had been assessed according to the fact that the woman had been charged in the case and that the counsel for the defence had not had the possibility to question her; this had been emphasized by the presiding judge in his charge to the jury. The decision is thus in line with the Court's

³ [...der er udformet i overensstemmelse med en international konvention.]

⁴ Madsen (1986), p. 38, views this case as expressive of the application of the *rule of presumption*. Frederik Harhoff: *Skønheden og udyret*, [The Beauty and the Beast], Retsvidenskabeligt Institut B, Studier nr. 18, Årsberetning 1986, Copenhagen (1987), pp. 69 ff., at p. 78, claims that no situation of interpretation was present in this case; should it take credit as any rule, this must, in the view of Frederik Harhoff, be the *rule of presumption*.

⁵ [Højesteret tiltræder, at dokumentationen af den indenretlige forklaring og af brevet i hvert fald under disse omstændigheder ikke var i strid med med retsplejelovens § 877, stk. 3, således som denne bestemmelse må fortolkes under hensyn til artikel 6, stk. 3, litra d, i menneskerettighedskonventionen.]

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previous decision in UfR 1985.1080 (see *supra* section 6.3) and two unpublished decisions of the *Vestre Landsret* (see *infra* section 8.2.2) in which the latter court expressed itself in accordance with the European Court in the *Unterpertinger Case*.⁶

A curious example of the application of the ECHR as a means of interpretation is that of *Retten i Slagelse's* judgment of 30 November 1985 in a case concerning tax fraud.⁷ In the judgment it was assumed that an investigation of 10 years altogether, *inter alia*, was contrary to the ECHR. This could, in the Court's view, "... possibly justify employing a suspended sanction or remission of the sentence" but not that the time-limit for prosecution had expired.⁸ However, in its judgment of 17 December 1984⁹ the same court had recognized that in certain cases the Convention may influence the Court's decision of whether or not the time-limit for prosecution has expired.

In NJA 1963.284 the *Svea Hovrätt* acquitted a person convicted by the *Tingsrätt* for violating tax laws referring to the prescription limit which was in force at the time of the alleged violation, although it had been extended at the moment of indictment. The Court based its decision on domestic law, but found it nevertheless appropriate to refer, in brackets, to Article 7 of the ECHR. *Högsta Domstolen* subsequently upheld the decision, but solely on the basis of domestic *Swedish* law and did not make any reference to the Convention.

In 1962 three persons were convicted by the *Tingsrätt* for disorderly conduct ["*förargelsesväckande beteende*"] for having displayed balloons with the text "*Algérie française*" during a demonstration organized by people of other political convictions.¹⁰ In 1964 the three men were acquitted by the *Svea Hovrätt*, which stated that under *Swedish* law their behaviour was not a crime without further specification. However, in his concurring opinion, one of the judges (now professor) *Jacob W.F. Sundberg*, explained that, by ratifying the ECHR, *Sweden* "... let it be understood that the *Swedish* criminal

⁶ Cf. Eur. Court H.R., *Unterpertinger Case*, Series A, Vol. 110 (1987), para. 33.

⁷ Case No. ss 163/1976 and ss 384/1979, reported as *Landsforeningen af Benificerede Advokaters Meddelelse* 21/1986.

⁸ [... muligt [kunne] begrunde anvendelse af betinget sanktion eller strafbortfald.]

⁹ Case No. ps 575/1984 and ps 590/1984. See also *Rehof & Trier* (1990), p. 89.

¹⁰ Reported in SvJT 1964.19.

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law was not an obstacle to the validity within the realm of the principles on freedom of expression, set out in Article 10, among which is to be found the freedom to disseminate information and ideas without interference by public authority."¹¹

Högsta Domstolen seems in NJA 1981.1205 to have become more attentive to the ECHR and did in fact apply the Convention as an important means of interpretation. The case concerned, *inter alia*, the question of the validity of an arbitration clause which was part of the terms of a group life insurance based on a collective agreement. The plaintiff claimed that, due to the arbitration clause, she was prevented from having her case tried by a court. In this respect she invoked, *inter alia*, Chapter 11, section 3, of the Instrument of Government, which lays down that legal disputes between individuals shall not be decided by any authority other than the courts except if laid down by law, and Article 6 of the ECHR. *Högsta Domstolen* maintained that transformation is required if concluded treaties are to have direct domestic effect. As regards the *principle of presumption*, the Court said:

"It should, however, be presupposed that the provisions of the Instrument of Government, which was passed after Sweden's ratification of the European Convention, are in accordance with its requirements and, besides, the latter can illustrate the content of the provisions of the Instrument of Government."¹²

Then, it was stated that Chapter 11, section 3, of the Instrument of Government, interpreted in the light of the Convention, did not prevent individuals from making arbitration agreements such as the one in question.

The interesting aspect of this judgment is that *Högsta Domstolen* stated, like the *Norwegian Høyesterett* in NRt. 1966.935 (see *infra* section 8.4), that the *principle of presumption* also applies to the Instrument of Government and not only to ordinary legislation. The consequence of this view is that, in relation to the impact of the Convention on the interpretation of the Instrument of Government, it makes no difference whether or not the

¹¹ Here cited in English from Sundberg (1988), p. 197.

¹² [Det får emellertid förutsättas, att bestämmelserna i regeringsformen, som tillkommit efter Sveriges ratifikation av Europeiska konventionen, står i överensstämmelse med dennas föreskrifter, och de senare kan därjämte belysa innebörden av bestämmelserna i regeringsformen.]

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Convention is incorporated into domestic law by a statute. In all events the Convention will be regarded as a means of interpretation to the Constitution.¹³ This view has been affirmed and developed further by *Högsta Domstolen* in the subsequent NJA 1989.121 (see *infra* section 8.3)

7.3. International Law does not lay down Clear Requirements on Domestic Law.

The application of international law by domestic courts represents a form of enforcement of international law. Different domestic solutions may give different degrees of effect to corresponding international rules. The domestic rules may be formulated in such a way as to support the international norms. This can be brought about if the domestic solutions counteract or reduce the effect of internationally illegal solutions, on the one hand, and if they facilitate the carrying out of transactions that are in accordance with the purpose of the international rules, on the other. The choice of the domestic solution to be adopted may therefore have international relevance even if one finds oneself outside the range of international sanctions.¹⁴

In UfR 1964.624 the *Højesteret* seems first of all to have reached its decision through an interpretation of international law. The case concerned the distribution among *Danish* nationals of a global compensation which Czechoslovakia had made available as compensation for the nationalization of *Danish* property in Czechoslovakia. A woman who held both Czechoslovak and *Danish* citizenship put forward a claim for her own part of this compensation to the tribunal in charge of distributing the global compensation in *Denmark*. However, the tribunal rejected her claim referring to her double citizenship. For the High Court it was undisputed between the parties that under international law a double citizenship prevents both states of which the individual is a citizen from protecting the person concerned against the other state. The crucial question was then whether international law was at all relevant for the tribunal which was distributing the compensation. According to the agreement with Czechoslovakia it was up to the *Danish* Govern-

¹³ Cf. Brunfelter (1986), p. 37.

¹⁴ Cf. Smith (1968), p. 161.

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ment to distribute the compensation, and the High Court awarded the woman compensation *ex gratia*.

The *Højesteret* scrutinized the *travaux préparatoires* of the agreement with Czechoslovakia as well as the *travaux préparatoires* of the statute incorporating it into domestic Danish law and overruled the High Court's decision on the following grounds:

"According to the available facts, the compensation paid by the Czechoslovakian State should serve as settlement of the claims that Danish citizens under the rules of international law might have in consequence of the implemented nationalizations.

According to information received on the implications of the agreement and the negotiations that have taken place prior to this, as well as [the woman's] citizenship in Czechoslovakia and her connection respectively with this State and with Denmark, she is not found, on the basis of her Danish citizenship, to have any claim under [the agreement on the distribution of the global compensation]" (emphasis added).¹⁵

It appears from Justice *Jørgen Trolle's* extrajudicial comment on the case that the *Højesteret* was of the opinion that the statute which incorporated the agreement with Czechoslovakia into domestic law (Act No. 179 of 7 June 1958) could only be interpreted as implying that compensation should be paid solely when this was required under international law.¹⁶ Consequently, the crucial question was the interpretation of international law in this field. After having discussed the position of international law, *Jørgen Trolle* concluded that "... it will be seen that the Italian-American case¹⁷ is to a considerable extent similar to the one adjudicated by the *Højesteret*, and that the

¹⁵ [Efter det foreliggende har den af den czechoslovakiske stat ydede globalerstatning skullet tjene til dækning af de krav, som danske statsborgere efter folkerettens regler måtte have i anledning af de skete nationaliseringer.

Når henses til, hvad der er oplyst om overenskomstens forudsætninger og de stedfundne forhandlinger forud for denne, samt til [kvindens] statsborgerskab i i Czechoslovakiet og hendes tilknytning til denne stat og til Danmark, findes hun ikke på sit danske statsborgerskab at have kunnet støttet noget krav på [overenskomsten om fordelingen af globalerstatningen.]

¹⁶ *Jørgen Trolle: Folkeret - Nationalisering - Spørgsmål om ret til andel i "globalerstatning" for en person med dobbelt statsborgerret i det erstatningsbetalende og erstatningsmodtagende land - Har fordelingsnævnets afgørelse karakter af en administrativ skønsudøvelse?* [International Law - Nationalization - Question of the right to a part in "global compensation" for a person with Double Citizenship in the Country Paying the Compensation and the Recipient Country - Do the Decision of the Tribunal Distributing the Global compensation Have the Character of Administrative Exercise of Discretion?], UfR 1964 B, pp. 276 ff., at p. 278.

¹⁷ The *Mergé Claim*, cf. Italian-United States Conciliation Commission; 1955, cf. International Law Reports 1955, pp. 443 ff.

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Højesteret is in line with the Conciliation Commission."¹⁸

The case has been quoted as an example of the application of both the *rule of interpretation* and the *rule of presumption*.¹⁹ It is, however, probably more consistent to regard the decision as one in which the *Højesteret* applied international law directly. International law did not seem to provide a specific solution in this case²⁰, yet, according to *Jørgen Trolle's* comment, the *Højesteret* examined the position of international law in detail. This is an interesting aspect of the case, and it may be viewed as an attempt to *enforce the rules of international law* by applying them directly in domestic law.²¹

In the more recent *Danish UfR 1972.600* international law seems to have been enforced to the detriment of the rule of law. The authorities of the Federal Republic of Germany had requested the seizure of some book-keeping material in *Denmark* belonging to a *Danish* citizen living in Italy; a German court needed it for use in a trial for tax fraud against the *Danish* citizen in Germany. In 1931 *Denmark* and Germany had concluded an agreement concerning mutual assistance in the administration of justice in criminal cases. The agreement was not incorporated into domestic *Danish* law and the Administration of Justice Act did not explicitly provide authorization to seize material in *Denmark* for use in trials abroad. In the case, the Ministry of Justice presented a memorandum stating that in connection with the ratification of the European Convention on Mutual Assistance in the Administration of Law - which had not been ratified by the Federal Republic - it was assumed that the said requests could be carried out in *Denmark* on the basis of analogies with the relevant provisions of the Administration of Justice Act.

The High Court was to turn down the request based on an analogy of the

¹⁸ [... det vil ses, at den italiensk-amerikanske sag i mangt og meget minder om den af Højesteret pådømte, og at Højesteret har lagt sig på linie med forligsnævnet.]

¹⁹ See Ross, Andersen, Lehmann & Magid (1984), p. 77.

²⁰ Cf. Madsen (1986), p. 37, note 12.

²¹ Zahle (1989), Vol. 2, p. 102, regards the judgment as one in which the Court has "harmonized" domestic law with international law rather than enforced international law by applying it in domestic law: "International law may be relevant, even though a violation is not imminent. The domestic application of law is adapted [to] - harmonized - with the international rule." However, in substance the employed terminology is probably only reflecting a difference in degree.

[International ret kan være relevant, selv om et brud ikke er truende. Den national retsanvendelse tilpasses - harmoniseres - med den internationale regel.]

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provisions in the Administration of Justice Act, because (1) the Administration of Justice Act contained provisions providing for the questioning of witnesses in *Denmark* for the use in trials abroad, which did not cover the request for seizure; and (2) such an extensive infringement would require explicit statutory authorization. The *Højesteret* was, however, willing to accept the seizure since it "... was embraced by the provision of section 745 (1) in the Administration of Justice Act, or, by analogy with this provision."²²

The fact that the Ministry of Justice on an earlier occasion had deemed it unnecessary to amend the Administration of Justice Act in order to fulfil the European Convention on Mutual Assistance in the Administration of Law seems to have had a considerable impact in this case. On the basis of this decision it may be concluded that the courts, in cases in which the Legislature has incorporated a treaty passively and this subsequently proves to be an insufficient fulfilment of the treaty, will grant the administration a margin of appreciation in the sense that in their application of domestic law the courts will follow the interpretation on the basis of which it was considered unnecessary to incorporate the treaty.²³ Since the ECHR was passively incorporated into domestic *Danish*, it is thus likely that the courts in the application of the Convention will follow the practice set forth in this judgment.

Insofar as the decision was motivated by a desire not to breach international law, the *Højesteret* seems to have gone very far in explaining away the conflict between international law and domestic law. *Niels Madsen* characterizes the decision as "... remarkable when one recalls that the starting point [...] is that treaty provisions cannot substitute the lack of authorization under *Danish* law in cases where this is required as the basis for *Danish* authorities' activity..²⁴ In reality, the decision was pronounced on such a slender basis that it is doubtful whether the requirements as to the authorization, contained in the *principle of legality*, were fulfilled.²⁶ One may wonder why

²² [... omfattet af retsplejelovens § 745, stk. 1, eller denne bestemmelses analogi.]

²³ Cf. Eilschou Holm (1981), p. 130.

²⁴ Cf. Madsen (1986), p. 39.

²⁵ [... bemærkelsesværdig, når man erindrer, at udgangspunktet er [...] at traktatbestemmelser ikke kan erstatte en manglende hjemmel i dansk ret i tilfælde, hvor en sådan er kræves som grundlag for danske myndigheders virksomhed.]

²⁶ Zahle (1989), p. 107, seems to have a somewhat ambiguous attitude to the compatibility

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the *Højesteret* in this case was willing to order seizure on such a slender basis; it was hardly obvious that to turn down the request would have constituted a breach of the Danish-German agreement.²⁷

In a large number of cases concerning *postliminium* after the German occupation, *Danish* and *Norwegian* courts had, to a considerable extent, to decide what weight should be accorded to the international law basis for the measures imposed by the occupation authorities. Here there were scarcely any international limitations upon domestic law when the case to be judged was one between citizens or between the State and citizens.

A fundamental question in this context was whether or not the acts of the occupying authorities were in conformity with international law. As will be seen, the attention paid to an effective implementation of the international rules on occupation was significant. This approach was adopted by the courts both in their interpretation of the restitution provisions, in their harmonization of these provisions with other legislation, and in their more free formulation of rules.²⁸

A large number of *Norwegian* cases could be mentioned in this respect. Since international law, unlike the ECHR, did not lay down clear requirements on domestic law, these decisions illustrate a general open attitude *vis-à-vis* international law rather than showing a direct impact on the

of this judgment with the *principle of legality*. On the one hand, he maintains that a treaty cannot serve as authority for those acts which under domestic law, according to the *principle of legality*, may be carried out only when authorized by statutory law. On the other hand, he (now) seems to accept this judgment as not infringing upon the *principle of legality*, but as functioning solely as an example of a case in which the treaty was applied in support of a result which due to other reasons (than the treaty) was well-founded. This is certainly a change in Zahle's view since in the preliminary edition of the book, Zahle stated, with specific reference to this case that "... the eagerness to observe international obligations cannot permit that domestic principles of the application of law moreover are set aside", cf. Zahle (1986), p. 130.

[Iveren for at overholde internationale forpligtelser kan ikke tillade, at nationale principper for retsanvendelse i øvrigt tilsidesættes.]

²⁷ In the relevant provisions of the agreement (Regulation No. 276 of 4 November 1931) it was stated that the Danish and the German governments had undertaken obligations "to guarantee reciprocity in the sense that advancing a request for [...] the extradition of objects or for assistance in the administration of justice in other respects, should, *inter alia*, be regarded as containing an undertaking, in the opposite case and, on request, to render the other party the requested assistance in the administration of justice."

[... at garantere gensidighed i den forstand, at fremsættelse af en begæring om [...] udlevering af genstande eller om retshjælp i øvrigt uden videre betragtes som indeholdende et tilsagn om i det omvendte tilfælde på begæring at ville yde den anden part den ønskede retshjælp.]

²⁸ See Smith (1968), p. 162.

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domestic application of the Convention. Moreover, the situation was indeed extraordinary. Accordingly, only a selected number of the most important cases in this respect will be discussed in this section.

A number of judgments concerning the seizure of claims contrary to international law is of special interest, *partly* because the enforcement of the rules of international law was expressed with particular clarity, and *partly* because the courts had no support in the *Norwegian* restitution legislation on this point.²⁹ In cases where the occupying authorities had confiscated a claim and then enforced payment (of it) by duress, the question arose whether the loss should fall on the creditor or the debtor. There was a great deal to be said for allowing the loss to rest with the creditor by virtue of the consideration - for which some support was found in international legal theory - that the illegitimate measure was directed against him and his property. Contrariwise, however, an argument also deriving from international law could be put forward, as laid down in the *Høyesterett's* decision in NRt. 1947.235. The circumstances were as follows:

After the assets of the *Norwegian* Shipowners' Association had been confiscated by the occupation authorities, the Gestapo, contrary to international law, demanded payment out of the Association's deposits in two banks. Subjected to pressure, the banks found it necessary to yield to this demand. After the war the question then arose whether the banks were obliged to pay the depositor as well, or whether the latter would have to bear the consequences of the exaction that had occurred.

The *Høyesterett* first referred to the ordinary contractual rule that a debtor who pays a person who is neither entitled nor authorized to receive payment is not discharged from his obligation to the rightful creditor, even if the payment is made under duress. The Court then considered the question whether this rule should also apply in the special circumstances of a case where the pressure had been exerted by the occupying power. It answered this question in the affirmative. Certainly the Court was open to the idea that the ordinary rules for discharging a debt might be departed from in such extraordinary circumstances, and indeed this point was expressly mentioned. Moreover, the Court did not content itself with the purely negative approach that there was no reason in this case to make any exception from this general rule. It found a positive basis for its decision by referring to the rules of

²⁹ *Ibid.*, at p. 163.

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international law in this field.³⁰

In the first opinion delivered, Justice *Schei* stated that it is "... in the interest of the community that the ordinary rules should be followed in cases of this kind, because that course of action will have an influence on the maintenance of the rules in this field laid down in international law for the protection of an occupied country when the debtor has to reckon with being obliged to bear the loss himself if he accedes to a demand for payment contrary to international law from the occupying power".³¹

In one of the subsequent opinions delivered, Justice *Schelderup* developed this view further, stating that in deciding "... this question, which is in its character purely one of legal policy", he would

"... accord decisive weight to (the factor) that after a war such as we have just lived through it is perhaps more important than ever to strengthen such tendencies as serve to counteract the appalling contempt for the international legal rules of warfare that we in our country constantly witnessed. For this reason I should regard it as especially unfortunate if the Supreme Court were, by its decision in this case, to proceed to alter our law as now in force to the extent that pressure exerted contrary to international law would be accorded the effect of an excuse comparable to force majeure when a borrower [...] has paid out to an occupying power a sum of money corresponding in amount to the sum standing to the creditor's account which the said power was unlawfully trying to appropriate. Should such a legal conception be adopted today [...] the risk that a borrower has hitherto run of being obliged to pay twice, to the usurper and to the lender, would then be eliminated. In other words, his incentive to create the greatest possible difficulties in his own interest, *inter alia* to protest that the usurper's conduct is contrary to international law, would be weakened. Even in the last war one had to experience that protests not infrequently attained their object. A change [...] would, to put it in another way, countenance and even encourage a passive attitude on the part of the debtor under threat, and would thereby positively serve to increase the belligerent's inclination for, and facilitate his execution of, this kind of exaction contrary to international law. It would also ill accord with modern tendency to increase the respect for, and the effectiveness of, the precepts of international law..."³²

Thus the principal point of view was that the *Høyesterett* must reach a decision that was in accordance "... with the modern tendency to increase the respect for, and the effectiveness of, the precepts of international law". The internationally illegal character of the demand for payment was accorded

³⁰ *Ibid.*, at p. 164.

³¹ Here cited in English from Smith (1968), p. 164.

³² *Ibid.*, at pp. 164 f.

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essential weight in assessing the domestic effect of the payment. The *Høyesterett* chose the solution which would most effectively counteract measures imposed contrary to international law, and which nullified the domestic effects of the internationally illegal transactions.³³ This can certainly be viewed as an attempt to enforce international law by applying it in domestic law;³⁴ and a stronger attempt than expressed in the two above-mentioned *Danish* cases.

Seen from the individual's point of view a more positive consequence of the application of international law in this field was that the legal dispositions of the occupation authorities were given full domestic effect insofar as they were considered lawful under the rules of international law. This is illustrated very clearly in the decision in NRt. 1950.84.³⁵

A public official who had been appointed by the Nazi authorities was dismissed after the war. He then claimed repayment of the amount he had contributed to the pension fund while he was in the public service. The statutory rules contained no provision that was applicable to this claim. The question was then whether international law offered any guidance. A minority in the *Høyesterett* was in favour of rejecting the claim. In their opinion it was of no significance whether or not the appointment was contrary to international law. For international law made no demands on the domestic law as regards the more detailed settlements in respect of unreceived salary and similar claims from the occupation period, including pension contributions. In other words, since the State was not bound by international law in this field, there was no further reason to accord any weight to the international-law aspect of the case.

However, the majority chose another line. Justice *Gaarder*, delivering the first opinion, as a representative of the majority, began by tracing the general guideline that, when *Norwegian* domestic provisions are lacking, the precepts of international law will be an essential factor in the judgment. It was further

³³ In the decisions in NRt. 1949.357, NRt. 1951.523, NRt. 1951.727 and NRt. 1951.905 further conclusions were in several aspects drawn from the principles laid down in the above-discussed decision.

³⁴ Cf. Fleischer (1984), p. 254; Smith (1964), pp. 191 ff.; Smith (1968), pp. 163 ff.; and Smith & Smith (1982), pp. 55 ff.

³⁵ See also the decisions in ND 1953.568 and in NRt. 1956.36 (the minority) in which it was accorded decisive weight that certain acts carried out by the occupying authorities were lawful under international law.

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stated that, in the absence of any provision to the contrary, *Norwegian* law must be assumed to be in harmony with the general principles of international law in this field. The principle of international law that the judge then applied was the provision in Article 43 of the Regulations of Land-Warfare laying down that the occupant shall take all steps in his power to re-establish and ensure, as far as possible, public order and public life in accordance with the law of the country. From this it follows, said the judge, that "... when the occupying power sees to it that [...] vacant posts are filled in accordance with the statutes of the occupied country, this measure is [...] legitimate both in relation to the international law and in relation to the law of the occupied country - i.e. *Norway* - and it must in the present context be equated with normal exercise of administrative power".³⁶

A similar, though less pronounced, tendency to enforce international law by applying it directly in domestic law can be found in some *Danish* cases deriving from the purge after the German occupation involving the question of the position of The Regulations of Land Warfare³⁷ in domestic *Danish* law.³⁸ In 1948.837³⁹ the *Højesteret* upheld a decision from the *Vestre Landsret*. In its grounds, the High Court stated that the provisions in The Regulations of Land Warfare meant that a horse which had come into the possession of the *Danish* State via the British forces, could not be subject to extinction after being commandeered by the occupying power. In the Regulations of Land-Warfare it was laid down that the occupying power is entitled to commandeer, *inter alia*, means of conveyance, but the latter shall be restituted when peace is concluded. It was undisputed in the proceedings that The Regulations of Land Warfare were applicable to the case. Thus, the

³⁶ Here cited in English from Smith (1968), p. 168.

³⁷ The Regulations respecting the Laws and Customs of War on Land annexed to the Convention IV of the second Peace Conference of 1907 in The Hague. The regulations are proclaimed in Regulation No. 37 of 20 January 1910, but no specific act has been passed to incorporate the regulations.

³⁸ Cf. Espersen (1970), p. 396.

³⁹ See also the decision of the *Vestre Landsret* in UfR 1947.772; and a decision of the *Østre Landsret* in UfR 1951.211. In both cases a similar interpretation of the status of The Regulations of Land-Warfare was expressed.

In UfR 1948.1237, in which a British shipowner had claimed compensation for the commandeering of a ship in a *Danish* shipyard by the Germans, *Sø- og Handelsretten* [the Admiralty and Commercial Court] to a large extent based its decision on the Regulations of Land Warfare, whereas the *Højesteret* referred to principles of contract law. The case is commented by Justice A. Drachmann Bentzon in TfR 1949, p. 208.

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Court seemed to be of the opinion that public authorities are obliged to apply the domestic rules of extinction in such a way as to be in harmony with concluded treaties. In an extrajudicial comment on the judgment Justice A. Drachmann Bentzon stated that "... it is certain that the claimant [the occupying power] and those who directly or indirectly draw their right from him, cannot be put in a better position than under The Regulations of Land Warfare."⁴⁰

Högsta Domstolen's decision in NJA 1929.592 has been cited as an example of a case in which a treaty was applied directly in domestic *Swedish* law.⁴² The case concerned a German shipper who was charged before a *Swedish* court with unlawful fishing in the Laholm Golf on the basis of the argument that the Laholm Golf was *Swedish* territorial waters.

The crucial question in the case was whether the Laholm Golf was part of *Swedish* territorial waters. *Sweden* maintained that the extent of the territorial waters was determined by a Royal Command to the Neutrality Fleet of 1779 concerning foreign privateering, and the Command set the limit at 4 nautical miles. Applying the 4 mile limit, the Laholm Golf became closed waters. Apart from the Command there was at that time no *Swedish* enactment on how to draw the borderline in the water. However, a treaty between *Sweden* and *Denmark* of 14 July 1899 concerning the fishery in *Swedish* and *Danish* territorial waters had been concluded which included a provision that *Danish* fishermen were allowed to fish outside a straight line drawn across the Laholm Golf.

The *Tingsrätt* stated, *inter alia*, that the fact that *Denmark*, which "... more than any other foreign power had an interest in the opening of the Laholm Golf for fishery, had accepted the fore-mentioned starting point undeniably constituted a strong support for"⁴³ the public prosecutor's argument that the Laholm Golf was a so-called historic bay under *Swedish* jurisdiction. Accordingly, the shipper was convicted for unlawful fishing in *Swedish* territorial waters. This conviction was subsequently upheld, with

⁴⁰ Cf. A. Drachmann Bentzon in TfR 1949, p. 206.

⁴¹ [Det er givet, at rekvirenten (okkupationsmagten) og de, der direkte eller indirekte udleder deres ret fra ham, ikke kan være bedre stillede end efter landkrisreglementet.]

⁴² Cf. Halvar G.F. Sundberg: *Lag och Traktat*, [Law and Treaty], 3rd edition, Stockholm (1942), p. 51.

⁴³ [... mera än någon annan främmande makt haft intresse av Laholmbuktens öppenhållande för fisket, godtagit förenärda utgångspunkt utgjorde unekligen ett starkt stöd för.]

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reference to its grounds, by both the *Hovrätt* and *Högsta Domstolen*.

In this case there was, however, hardly any conflict between international law and domestic law. The treaty was applied solely to prove the content of domestic law.⁴⁴ Thus, the decision does not really say anything on the relationship between international law and domestic *Swedish* law, and it can certainly not be taken as a proof that international law is part of domestic *Swedish* law.

7.4. Tentative Conclusions.

If there is an internal source of law which can be interpreted in several equally acceptable ways this is in principle a situation where the question whether or not there is a conflict between international and domestic law can be raised. Here it is established in legal writings and confirmed in judicial practice that the person or authority applying the law shall choose the interpretation which corresponds with the international source of law, cf. section 7.2. This is generally regarded as a manifestation of the *rule of interpretation*.

Moreover, it follows from the case-law discussed in section 7.3 that international law and the ECHR certainly play a more prominent role in judicial practice than presupposed in the *principle of presumption*. Thus there exists a positive interaction between international law and domestic law which, *inter alia*, manifests itself in the fact that the courts, in particular *Norwegian* courts, on a number of occasions have applied international law in cases in which there was no risk that domestic law would be contrary to international law. It should in particular be pointed out that in these cases the courts have applied domestic law in accordance with often quite unclear rules of international law. This may probably be most appropriate regarded as an attempt to *enforce* international law by applying it at the domestic level or as an attempt to *harmonize* international law and domestic law. This is in itself an interesting aspect of the issue since it shows that the *principle of presumption* is not qualified to explain the process of the application of international law in domestic law and provide clear guidelines as to the resolving of such conflicts. As indicated in section 2.3, this is probably due to the fact that the principle has two different functions; it serves both as

⁴⁴ Cf. Espersen (1968), pp. 289 f. See also Brynolf Eng: *Tillämpningen av internationella överenskommelser i intern svensk rätt*, [The Application of International Agreements in Domestic Swedish Law], NTFR 1938, pp. 94 ff., at p. 107; and Stig Jägerskiöld: *Folk rätt och inomstatlig rätt*, [International Law and Domestic law], Stockholm (1955), p. 206.

Tentative Conclusions

legitimation for the application of international law in the domestic legal order and as a principle of interpretation for conflicts between international law and domestic law.

Finally, on the basis of UfR 1972.600 it may be concluded that, in cases in which the Legislature has incorporated a treaty passively and this subsequently proves to be an insufficient fulfilment of the treaty, the courts will grant the administration a margin of appreciation in the sense that in their application of domestic law the courts will follow the interpretation on the basis of which it was considered unnecessary to incorporate the treaty.

CHAPTER 8

Direct Application of the European Convention

8.1. Introduction.

In chapter 7 the cases in which the ECHR and other international instruments were applied as a means of interpretation relating to the domestic rule at issue were discussed. To a large extent these cases were characterized by the fact that international law did not lay down clear requirements on domestic law. Accordingly, the question of how conflicts between international law and domestic law should be resolved played a fairly unobtrusive role. In this chapter, emphasis will be placed on the resolving of potential conflicts between international law and domestic law, and the cases in which the ECHR and international law in general have been applied directly will be discussed. By *direct application* of the Convention is understood the fact that *Scandinavian* courts rely on it *per se* and indeed apply and interpret its provisions qua its persuasive force, although it has not formally been incorporated into domestic law (see *supra* section 2.4). It should be stressed once again that the distinction made here between international law as a means of interpretation and the direct application of it is based solely on practical considerations - namely the degree to which international law has been applied in domestic law in the case at issue - and thus does not reflect any analytical distinction.

It may be useful to make a few distinctions in this connection in order to emphasize certain characteristics as to the degree to which the ECHR has been applied in the different cases. Accordingly, in section 8.2 cases in which the ECHR and international law in general has been applied directly will be discussed. Section 8.3 is reserved for cases in which the domestic courts *ex officio* have made references to the Convention. In section 8.4 the cases in which a judgment from the European Court concerning the country at issue has had a major impact on the national Court's reasoning as to the interpretation of domestic law will be examined. Finally, in section 8.5 the case-law discussed in this chapter will be summed up and an attempt to draw some conclusions will be made.

8.2. Direct Application of International Sources of Law.

8.2.1. International Law in General.

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The cases discussed in this section may at a first glance seem to be very different, causing only a minor impact on the application of the ECHR at the domestic level. This is true as regards the kinds of the international instruments applied in these cases; none is as forceful an international instrument as the ECHR (see *infra* section 10.2). However, one point common to all the cases stands out: international law has been applied to a greater extent than can reasonably be explained solely by referring to the *principle of presumption*.

In UfR 1982.1128, which concerned the immunity of states, an embassy had concluded a private law contract containing a provision that disputes should be brought before a *Danish* court. In the proceedings the embassy nevertheless invoked its diplomatic immunity. This was turned down by the *Højesteret* which stated that

"... neither under the provisions of the Vienna Convention,¹ nor under the rules of international law concerning the immunity of states, is an embassy considered exempted from lawsuits when that embassy has concluded a private law contract which contains a stipulation that disputes shall be determined by the courts of the recipient country."²

The difference between this case and the afore-mentioned UfR 1942.1002 and NRt. 1938.584 (see *supra* section 7.2) is presumably not due to changes in domestic law but to a development in international law. In this case the *Højesteret* based its decision to a large extent on an interpretation of general principles of international law, since the (incorporated) Vienna Convention did not provide an answer to the question raised. Thus the Court seems to have presupposed that an embassy is normally immune, unless international law, as an exception, deprives it of this protection.³

The decision may be viewed as an example of the application of the *rule*

¹ The Vienna Convention was adopted into domestic *Danish* law by Act No. 67 of 8 March 1968 on Diplomatic Relations. As an example of the application of this convention, see UfR 1989.873.

² [... hverken i henhold til Wienerkonventionens bestemmelser eller de folkeretlige regler om staters immunitet findes en ambassade fritaget for søgsmål på grundlag af en af ambassaden indgået privatretlig kontrakt, der indeholder en bestemmelse om, at tvistigheder skal afgøres ved modtagerstatens domstole.]

³ See Madsen (1986), p. 36.

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*of presumption.*⁴ This presupposes, however, that the provisions of the Administration of Justice Act concerning the local jurisdiction of the courts as well as the provisions of the Vienna Convention were interpreted in the light of international law under the presumption that the Legislature had not intended to legislate in violation of this. It seems therefore more appropriate to regard the decision as a direct application of international law.⁵ The grounds of the judgment are, to a considerable extent, based on an interpretation of international customary law and there seems to be no indication of considerations concerning the application of domestic law, apart from the Vienna Convention.

Such a direct application of international law seems also to have been presupposed in the decision in UfR 1962.617 taken by the *Københavns Byret* in its capacity of court of execution in which it is stated that the Court *ex officio* should see to it that execution did not violate the right of extraterritoriality. Although the case is a City Court case, it should nevertheless be regarded as expressive of the legal position in this respect.⁶ The fact that this decision has been published - an exception with decisions from the City Courts - is further proof that it should be assumed to have general validity.

In UfR 1953.595 it was assumed that the provisions of an international convention on the conveyance of goods, which had been proclaimed in the *Danish Law Gazette*, were binding on *Danish* subjects, even though it derogated from the rules which under the State Railways Act applied to the conveyance of goods on the *Danish* State Railways' own sections. The *Østre Landsret* scrutinized the *travaux préparatoires* of the State Railways Act very carefully and - on the basis of a strained interpretation - came to the result that this statute could be regarded as providing sufficient authorization to bring such conventions into force in domestic law. Thus, the domestic provision was found to be in conformity with the convention. However, the City Court had had no doubts in applying the convention directly, since - as it intrepidly stated in its decision - it cannot "... be decisive that the rules of the international agreement do not have the force of law or that they are published solely in the *Danish Law Gazette*, Section C."⁷

⁴ Eilschou Holm (1981), p. 127, finds it more appropriate to regard the acceptance in *Danish* law of the rules of extraterritoriality of international law as based on legal custom rather than on a "flimsy" principle of interpretation.

⁵ Cf. Madsen (1986), p. 36.

⁶ *Byretterne*, of which there are 82, are the lowest instances of law courts in *Denmark*.

⁷ [... heller ikke [kan] være afgørende, at reglerne i den internationale overenskomst ikke har lovkraft, eller at de kun er optaget i Lovtidende C.]

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With regard to the *Norwegian* prosecution of war criminals, both the provisional Royal ordinances issued during the war and the later statutory provisions referred directly to the laws and customs of warfare. Accordingly, it was a condition for establishing criminal liability that the international rules of warfare had been violated. Moreover, the rules of international law were actively taken into consideration in the courts' reasoning both in deciding the range of the *Norwegian* legislation and in meting out the punishment.

As regards the authority for pronouncing the death penalty, the *Høyesteret*, sitting in plenum, in NRt. 1946.198 in the *Klinge Case*⁸ had to deal with the question of retrospectivity. The background was an extension of the power to pass death sentences which had been made just before the end of the war by virtue of a provisional Royal ordinance of 4 May 1945. The *Høyesterett* held by a majority of 9 to 4 that a sentence of death could be passed despite the fact that this penalty was not authorized by *Norwegian* legislation relating to the crimes in question at the time they took place. A decisive link in the chain of reasoning for this decision, which was subsequently followed in similar cases, were the rules of international law. A group of seven members within the majority, who thus constituted a majority of the Court, grounded their decision expressly on the *Norwegian* Royal ordinance and found that it could apply to previous transgressions, despite the general constitutional prohibition against giving laws a retrospective effect, embodied in Article 97 of the *Norwegian* Constitution, because "... both the criminal liability and the extent of the penal sanction had already been established in the rules of international law regarding the laws and customs of warfare".

The international character of the prosecution of the war criminals constituted an important element in the reasoning of the judgment. Justice *Skau* delivering the first opinion, as a representative of this majority, maintained - prior to the Nuremberg judgment - that international law had established individual criminal responsibility in respect of the acts under discussion, and further, that according to international law the most severe penalties, including a sentence of death, could be inflicted for those war

⁸ The case is discussed by Smith (1964), pp. 364 f.; Smith (1968), pp. 172 ff.; Carsten Smith: *Grunnloven og folkeretten ved krigsforbrydelser*, [The Constitution and International Law in Connection with War Crimes], in *Statsliv og rettsteori*, Oslo (1978), pp. 22 ff.; Rolf Normann Torgersen: *Klinge-saken i Norges Høyesterett*, [The Klinge Case in the Norwegian Supreme Court], UfR 1946 B, pp. 192 ff.; and Alf Ross: *Klingesagen*, [The Klinge Case], UfR 1946 B, pp. 247 ff.

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crimes.⁹ He then dealt with the question whether the constitutional provision against retrospective effect could prevent "... the incorporation of the international rules by way of the Royal ordinance of 1945 from having effect as regards the war crimes committed before the passing of the ordinance". His answer was in the negative, and his reasons were given in statements of this type:

"The foreign war criminals who are sentenced in *Norway* will not be sentenced for an act that was not previously punishable, nor be sentenced to a penalty that could not previously have been inflicted, even though one assumes that a *Norwegian* court could not have done without the Royal ordinance of 1945. But here, then, I accord decisive weight to the fact that what characterizes the acts now in question is not that they are crimes according to *Norwegian* law, but that they are *war crimes*. And I further emphasize the correspondingly international character of the proceedings against - and punishment of - the war criminals."¹⁰

In a later passage it was underlined that the acts perpetrated by the defendants

"... at the time when they were carried out, were crimes according to international law and were punishable with the most severe penalty [...] The passing of the Royal ordinance of 1945 was a link in - or a consequence of - *Norway's* agreement with the allied nations on punishment of the war criminals and on the sharing of these proceedings. The legal claim to such punishment on the part of the allied belligerent nations - including *Norway* - arose by virtue of the rules of international law regarding the laws and customs of warfare, and with a substance determined by these, the very moment the war crimes were committed."¹¹

The effect of the Royal ordinance of 1945 was then in reality only that, with respect to the requirement in the *Norwegian* constitution, any punishment must be authorized by *Norwegian* law,¹² and it opened the way for *Nor-*

⁹ In a comment on the case, Alf Ross, *op.cit.*, asserted that this was an erroneous interpretation of international law. There was, according to Ross, no norm of international law which "prohibited war crimes" and inflicted a penalty for them on individuals. The states have in this respect an extended jurisdiction to prosecute war criminals, but this is certainly not the same as saying that punishment for war crimes is directly criminalized under international law.

¹⁰ Here cited in English from Smith (1968), p. 173.

¹¹ *Ibid.*

¹² See Article 96 of the *Norwegian* Constitution which reads: "No one must be convicted except according to law, or be punished except according to judicial sentence. Interrogation by torture must not take place", cf. Albert P. Blaustein & Gisbert H. Flanz (eds.): *Constitutions of the Countries of the World*, Binder XI, June 1988, p. 7.

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wegian courts to give effect to "the legal claim to punishment previously acquired".

The other group within the majority of the Court avoided the question of retroactive effect, for the two judges in question considered it unnecessary to found their judgments on the *Norwegian* ordinance, but held that the defendants could be sentenced by virtue of a direct application of the universal rules of warfare, which were immediately binding upon him.¹³

Some *Norwegian* scholars, including Professor *Carsten Smith*, have had difficulty in accepting this decision and its application of international law, since the application in this instance worked to the detriment of the defendants and did so in relation to some of the most important guarantees of justice embodied in the *Norwegian* constitution.¹⁴ It can also be asserted that, as regards the main and decisive view taken, one is faced with an application of international law that is aimed primarily at extending and giving effect to some of the national legal rules. However, at the same time it must be recognized that this decision reflects the same main guideline for the application of international law as in the majority of cases of the *Norwegian* purge after the German occupation: an interpretation of *Norwegian* law with the aim of granting the greatest possible domestic effect to the rules that the *Høyesterett* regarded as the applicable rules of international

¹³ This point was partly specified to the effect that the *Norwegian* ordinance of 1945 was to be understood as providing mere rules of interpretation, and partly to the effect that enemies invading the country stand outside the *Norwegian* legal community. In a later *Høyesterett* decision in NRT. 1947.434 this line was developed in greater detail in a separate opinion by Justice *Schelderup*, in which the constitutional requirement as to *Norwegian* authority for a punishment was subjected to a more thorough analysis. It was submitted here, that in a legal field such as the one under discussion, where penal provisions could not, by virtue of the circumstances, have crystallized into statutory form, it must suffice that this penal rule was sufficiently clear with regard to the nature of the act and the threat of punishment.

¹⁴ In a statement of 29 June 1945, submitted to the Committee of Justice in the *Storting*, when passing a bill on a contemporary statute upholding, *inter alia*, the Royal Ordinance of 4 May 1945, Professor *Frede Castberg* and Professor *Johs. Andenæs* stated that applying the Royal Ordinance of 4 May 1945 is "...clearly contrary to Article 97 of the Constitution".

Their reasons for submitting the statement to the parliamentary committee was that "...when we have felt it our duty to cry off, this has first and foremost been caused by the consideration for the lasting interests which the preservation of our *Norwegian* legal tradition represents. With the indignation which today rightly reigns towards the conduct of the war criminals, perhaps there are many who would accord less weight to the constitutional considerations. One must reckon that in the future the view will change."

[... i klar strid med Grunnlovens § 97.] [Når vi har følt det som vår plikt å si fra, skyldes det først og fremmest hensynet til de varige interesser som bevarelsen av vår norske rettstradisjon representerer. Under den indignasjon som i dag med rette hersker over krigsforbryternes fremfærd er det kanskje mange som vil legge mindre vekt på de grunnlovsmessige hensyn. Men en må regne med at ettertidens syn vil være et andet.]

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law.

It seems that *Regeringsrätten* in RÅ 1969.K 1020 has presupposed that international law can be applied directly. However, the case is very special and one should probably be careful of not viewing it as an ultimate precedent in this field.

The creation of the common *Scandinavian* aircraft carrier Scandinavian Airlines System forced the regulating bodies in *Denmark*, *Norway* and *Sweden* to establish a parallel co-operation, manifested in the so-called Government Agreement of 21 December 1951. Under this agreement a joint administrative body, the OPS-Committee, was established which was charged with planning the line inspection of the three authorities and dealing with common questions.

At a meeting in November 1967, the OPS Committee dealt with the question of restricting flying certificates rights on medical grounds. At a meeting in April 1968 it was decided that the principles already discussed and drafted in the previous meeting should apply in *Denmark*, *Norway* and *Sweden*.

Being faced with an application for renewal of the flying certificate from a pilot, the *Swedish* Civil Aviation Agency decided on 29 August 1968 to refuse renewal on medical grounds. The applicant then appealed against the decision. He argued that it was all very well that the principles followed harmonized with the rules followed in international practice, but that such rules could be followed "... only on condition that they are determined by the *Swedish* authorities which are to issue the rules in question". This meant, he said, that a constant *Swedish* practice could not be changed in any other way except by new *Swedish* enactments. The decision of the Civil Aviation Agency was therefore not founded on a medical examination of the health of the applicant, "... but on an erroneous [...] decision of principle, taken by the OPS Committee."¹⁵ The Agency replied that it was out of the question that it should refuse to accept a majority decision taken in these matters by the OTS Committee.

Thereupon, *Regeringsrätten* rejected the appeal.

8.2.2. The European Convention.

In an unreported *Danish* case¹⁶ in which an Algerian citizen had been convicted of a penal traffic offence, the *Københavns Byret* held that "... the cost of the interpreter must be borne by the State, cf. Article 6(3)(e) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which have been ratified by *Denmark*, Regulation No. 20 of 11 January 1953" (emphasis added). The decision should be seen in connection with section 1008 of the *Danish* Administration of Justice Act, which stipulates that "[i]f the accused is convicted [...] he shall be required to pay the State the necessary expenses of the trial."¹⁷ The case is now considered a leading

¹⁵ Cited in English from Sundberg (1988), p. 195.

¹⁶ Judgment of 25 April 1966, Case No. 21472/1965, I.

¹⁷ [Findes sigtede skyldig [...] er han pligtig at erstatte det offentlige de nødvendige

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case in the application of the the Convention;¹⁸ it was followed by a circular from the Ministry of Justice to public prosecutors and courts stating that the costs of interpretation were to be borne by the State.¹⁹

The case is remarkable on two points. First, references to the Convention are made in judgment. This is in itself noteworthy since there was at that time no tradition for making references to unincorporated treaties in *Danish* judgments. Second, the decision is based on an original interpretation of Article 6 of the Convention. The question of the interpretation of Article 6 in relation to the costs of interpreters in criminal trials was first decided by the European Court in 1978.²⁰

Thus, the case illustrates that an underlying treaty obligation may have a considerable impact on the interpretation of a domestic provision which was in force at the time of the ratification of the treaty and which was not, at that time, considered to be contrary to the treaty obligations.²¹ One should, however, note that there was no question of setting aside a domestic statutory provision; the domestic rule was interpreted in the light of the Convention which, consequently, produced the effect that a circular was set aside. Moreover, it should be noted that the application of the Convention in the case resulted in a better legal position for the individual than provided for within the domestic legal order. In such cases the tendency to apply non-incorporated treaties must be assumed to be more pronounced.²²

In a recently published article,²³ reference was made to an unreported case from the

udgifter, som er medgået til sagens behandling.]

¹⁸ Cf. Eilschou Holm (1981), p. 129; and Carl Aage Nørgaard: *Den europæiske menneskerettighedskonvention og dansk ret* [The European Convention on Human Rights and Danish Law], UfR 1987 B, pp. 73 ff., at p. 75.

¹⁹ Circular No. 77 of 9 May 1967, which repealed the older circular No. 299 of 23 November 1922.

The 1967 circular has now been repealed and substituted by the Ministry of Justice's circular of 7 July 1989 on the application to the payment of the costs of interpretation in which it is laid down that the costs of interpretation in some specified civil cases are also to be borne by the State. This change was necessitated by the European Court of Human Rights' judgment in the *Öztürk Case* (cf. Eur. Court H.R., *Öztürk Case*, Series A, Vol. 73 (1984)), cf. The Ministry of Justice's letter of 7 July 1989 (j.nr. 1989-1001-51) to the courts.

²⁰ See Eur. Court H.R., *Case of Luedicke, Belkacem, and Koc*, Series A, Vol. 29 (1978).

²¹ Compare UfR 1972.600 (see *supra* section 7.3).

²² Cf. Madsen (1986), p. 39; and Zahle (1989), Vol. 2, p. 108.

²³ Cf. Holst-Christensen (1989), pp. 55 ff.

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*Vestre Landsret*²⁴ concerning the smuggling of big quantities of hashish into Denmark in which the Convention should have had a considerable impact, although this does not appear from the Court's ruling. The circumstances were as follows:

The public prosecutor asked for permission to read evidence in the form of two policemen's reports which contained the interrogation of two witnesses carried out in Belgium. Alternatively the public prosecutor asked for permission to cross-examine the two detective inspectors who had carried out the interrogation in Belgium. In support of this request it was alleged that the persons in question, charged with trading hashish, had been called as witnesses but had not wanted to appear before the Court and that, under Belgian law, it was not possible to cross-examine the two witnesses in Belgium in the presence of the defence counsels.

The High Court rejected both requests on the following grounds: "The application of policemen's reports as evidence instead of cross-examination before the court of the person who has made a statement contained in the policeman's report involves considerable doubt as to the rule of law, particularly because the counsel for the defence is prevented from addressing questions to the witnesses.

The doubts are, in particular, considerable in a case like the present one where the policeman's report does not concern a minor count but must be assumed to serve as essential evidence of what quantities of hashish the accused [...] had bought."²⁵

It is hereinafter stated in the article that in its ruling the Court paid special attention to the *Unterpertinger Case* before the European Court. In this case the European Court expressed itself as follows: "In itself, the reading out of statements in this way cannot be regarded as being inconsistent with Article 6(1) and 3(d) of the Convention, but the use made of them as evidence must nevertheless comply with the rights of the defence [...]. However, it is clear from the judgment of 4 June 1980 that the Court of Appeal based the applicant's conviction mainly on the statements made by [...] to the police. It did not treat these simply as items of information but as proof of the truth of the accusations made by the woman at the time" (emphasis added).²⁶ Then, the Court held that Article 6(3)(d) of the Convention had been violated.

Thus, the High Court was in line with the European Court's argumentation in the case, but an explicit reference to the Convention or the judgment was, as mentioned, not made. The impact of the Convention must be assumed to have been considerable, since section 877(3) of the Administration of Justice Act contains no guidelines as to which situations would enable the Court, as an exception, to permit the reading

²⁴ Judgment of 20 September 1988, Case No. V.L. S 1249/1988.

²⁵ [Anvendelse af politirapporter som bevismiddel i stedet for vidneafhøring i retten af den, der har afgivet forklaring til politirapporten, er forbundet med væsentlige retssikkerhedsmæssige betænkeligheder, navnlig fordi tiltaltes forsvarer afskæres fra muligheden for at stille spørgsmål til vidnet.

Betænkelighederne er særlig store i et tilfælde som det foreliggende, hvor politirapporten ikke vedrører forhold af underordnet betydning, men må antages at skulle tjene som et væsentligt bevis for, hvilke kvanta hash tiltalte [...] har aftaget.]

²⁶ Cf. Eur. Court H.R., *Unterpertinger Case*, Series A, Vol. 110 (1987), para. 33.

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of documents embraced by the provision.²⁷

In a subsequent ruling of 2 February 1989²⁸ in a similar case the *Vestre Landsret* literally repeated its reasoning in the above-mentioned case. However, in this case reference to Article 6(1) and (3)(d) of the Convention was made in the ruling.²⁹

In these cases, like in UfR 1985.1080 and UfR 1988.440 (see *supra* section 6.3), the *Danish* courts have showed themselves to be even more willing to discuss explicitly whether a *Danish* provision is compatible with the Convention. The *Danish* Attorney General and former head of the Law Department of the *Danish* Ministry of Justice, *Asbjørn Jensen*, has recently characterized the situation as follows:

"In such cases, the courts will often apply the direct test: Whether the step or decision taken is contrary to any provision of the Convention. In other words, the courts apply the European Convention on Human Rights as a *true source of law* when they determine the concrete legal contents of their decisions" (emphasis added).³⁰

If the decision in the *HT Case* raises any doubts as to the *Højesteret's* willingness to apply the Convention directly, a series of decisions from both the *Højesteret* and the *Østre Landsret* in 1989 seems to have gone one step further in the application of the Convention. These decisions manifestly presuppose that the Convention is a *source of law* in domestic *Danish* law, and that *the courts are entitled to review the compatibility of the Convention with domestic law*.

The first case in this series was UfR 1989.302 which concerned the question of whether the detention of an applicant for asylum, whose identity was not adequately established, was in accordance with Article 5 of the Convention. After having laid down that the detention was authorized under *Danish* law, the *Københavns Byret* stated in its order "... that such a detention under section 37, cf. section 36, of the Aliens Act *lies within the framework which*

²⁷ See also the *Østre Landsret's* ruling of 14 September 1987 (Case No. ØL 1. afd, kære nr. 246/87), reported as *Landsforeningen af Benificerede Advokaters Meddelse* No. 143/87.

²⁸ Case No. V.L. S 2581/1988.

²⁹ See also the *Vestre Landsret's* ruling of 24 April 1990 (Case No. V.L. S 25/1990) in a fairly similar case.

³⁰ Cf. *Asbjørn Jensen: Incorporation of the European Convention seen from a Danish Point of View* in *Rehof & Gulmann* (1989), pp. 161 ff., at p. 169.

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has been laid down by Art. 5(1)(f) of the European Convention of Human Rights" (emphasis added).³¹

The High Court subsequently upheld this order with reference to its grounds - after having cited extensive parts of the parties' submissions before the High Court as regards the compatibility of domestic law with the Convention.

Whereas the question of the compatibility of domestic law with the Convention in the above-mentioned cases was one of several other questions which the Court had to decide, in this case it was, in effect, the only question to be decided.

Similarly, in the *Højesteret's* decision on the merits in UfR 1990.13 the relationship between domestic law and the Convention was, in effect, the only question to be decided.³²

In NRt. 1984.1175 the question at issue was whether a person who had been committed to mental hospital under section 39(1)(e) of the *Norwegian Criminal Code*, could also invoke the provision in section 9 a of the *Mentally Ill Persons Act* and, on this basis, claim judicial review of the compulsory means. Both the *Byrett* and subsequently the *Lagmannsrett* were to reject the case since, in their view, the courts had no subject-matter jurisdiction in the case, because the compulsory means was authorized also under the *Penal Code* and not solely under the *Mentally Ill Persons Act*. Before the *Højesteret* the appellant (in the interlocutory proceedings) invoked Article 5 of the Convention and made specific reference to the *Winterwerp Case*,³³ the *Case of X v. the United Kingdom*³⁴ and the *Case of Y v. the United Kingdom*.³⁵ As regards the general application of the law in the case, Justice *Røstad*, speaking for a unanimous Court, first observed that neither the wording in the Act of 1961 - such as this reads after the amendment in 1969 - nor the *travaux préparatoires* give direct guidance as to whether the access

³¹ [... at en sådan frihedsberøvelse efter udlændingelovens § 37, jf. § 36, ligger indenfor de rammer, som er fastlagt ved artikel 5, stk. 1, litra f, i Den europæiske Menneskerettighedskonvention.]

³² See also the *Højesteret's* judgment in UfR 1989.928 (see *infra* section 8.3) and the *Østre Landsret's* judgment in UfR 1989.775 (see *infra* chapter 9).

³³ Cf. Eur. Court H.R., *Winterwerp Case*, Series A, Vol. 33 (1980).

³⁴ Cf. Eur. Court H.R., *Case of X v. the United Kingdom*, Series A, Vol. 46 (1982).

³⁵ Application No. 6870/75 Rights, cf. D.R., pp. 37 ff.

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to claim judicial review is also open for the one who is committed to mental hospital on the basis of a judgment. He then continued:

The decision to be taken must accordingly take into account all relevant considerations, in particular the consideration that *Norwegian* law, as far as possible, should be *presupposed* to be in accordance with treaties to which *Norway* are bound - in this case the European Convention on Human Rights of 4 November 1950" (emphasis added).³⁶

Then, the judge discussed, quite extensively, the invoked case-law from the European Commission and Court and concluded that the Mentally Ill Persons Act should be interpreted in such a way as to reflect the view put forward by the Strasbourg organs. Accordingly, he found that the courts had subject-matter jurisdiction in such cases, and the case at issue was rescinded and remitted to retrial.

Although the case apparently, in the *Høyesterett's* opinion, concerned a question to which domestic law did not provide a clear answer, and could thus be viewed as an example of an very extensive application of the *principle of presumption*, it is nevertheless of much interest regarding the application of the Convention.³⁷ First, it was generally stated that domestic *Norwegian* law should be *presupposed* to comply with international law; the legal doctrine has traditionally expressed itself in somewhat more guarded terms and laid down that domestic law should be *presumed* to be compatible with international law. Thus the *principle of presumption* seems to have been tightened in this case. Second, the extensive discussion of the interpretation of the Strasbourg case-law, in which *Norway* had not been involved, seems not only to be the first example of such in-depth discussion of Strasbourg case-law in *Scandinavia*, but also reflects how seriously the Convention is taken in the *Høyesterett*. Third, in its concrete application of the law the

³⁶ [Avgjørelsen må treffes ut fra de reelle hensyn som her gjør sig geldende, herunder det hensyn at norsk lov så vidt mulig må forutsettes å være i samsvar med traktater som Norge er bundet av - i dette tilfelle Den europeiske menneskerettighetskonvensjon av 4. november 1950.]

³⁷ It should be noted that the *Norwegian* Act of Criminal Procedure in section 4 (before 1 January 1986, section 5) contains a provision laying down that the Act should be interpreted with the reservations deriving from international law.

However, neither the *Høyesterett* nor the parties seem to have been aware of this fact. Thus the *Høyesterett's* argumentation in this case should be viewed as regarding a "non-incorporated" treaty although, strictly speaking, one is here within the sphere of *sector-monism*, cf. Eivind Smith: *Domstolskontroll med lovgivning i Norge etter ca. 1970*, [Judicial Control of Legislation in Norway approximately after 1970], TFR 1990, p. 106 note 17.

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Høyesterett paid so much attention to the Convention that it seems to be more appropriate to view the decision as one in which the provision in section 39 of the Penal Code, in effect, was set aside as a result of the conflict with the Convention.³⁸

In his partly concurring opinion in NRt. 1989.1327 Professor *Carsten Smith*, acting as temporary appointed justice in the *Høyesterett*, found it necessary to disapprove a statement made in a dissenting opinion in the *Lagmannsrett* to the effect that no judicial review would have been possible of the prosecuting authority's decisions regarding security measures under section 39 of the Penal Code:

"In reply [...] it should be pointed out that the Supreme Court has decided [in NRt. 1984.1175], amongst other things on the basis of Article 5 § 4 of the... [Convention]... as interpreted by the Court and Commission, that a person subject to security measures and also detained in a mental hospital has the right to obtain a decision at reasonable intervals as to whether continued detention is lawful. I maintain that this right to judicial review which is enshrined in Article 5 § 4 and which the Supreme Court has established for one category of persons subject to security measures, must be applied by the courts also in relation to other persons subject to such measures who are deprived of their liberty in other institutions."³⁹

The majority of the *Høyesterett* did not find that the case gave cause to rule on this point. Accordingly, Professor *Smith's* opinion appears to be an *obiter dictum*.⁴⁰

³⁸ Cf. Aall (1989), p. 635; and Eivind Smith, op.cit., p. 106. See also Eckhoff (1987), p. 268.

³⁹ Here cited in English from Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), para. 42.

⁴⁰ Another interesting *obiter dictum* was given by Justice *Aasland* in NRt. 1983.1004 in a case which touched upon the question of the relationship between the *Norwegian* Abortion Act and the Convention: "Although there are strong indications that the case could have been decided on the grounds argued here by the Government with reference to the Appeal Court's judgment, I find it unsatisfactory under the circumstances to ignore the question of the legal validity of the Abortion Act [...] I start with the question of international law, where the provision of Article 2 of the European Human Rights Convention is particularly important. This Convention, to which *Norway* has acceded, is legally binding on the contracting States. A somewhat controversial question in the literature on international law is whether and to what extent the provision of Article 2 imposes requirements as to the contents of abortion laws. The Austrian Constitutional Court has in a decision of 11 October 1974 considered that the provision according to its contents does not comprise the unborn. I for my part do not find it necessary to decide whether it is justified to rely on such an absolute interpretation. In any case the provision must be regarded as not imposing any far-reaching restrictions on the legislator's right to set the conditions for abortion. The *Norwegian* Act, under which the woman herself makes the final decision whether or not to terminate her pregnancy provided the operation can be made before the end of the twelfth week of pregnancy, is similar to the

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In a ruling of 16 March 1990⁴¹ the *Høyesterett's* Interlocutory Appeals Committee seems to have paid decisive attention to the *Hauschildt Case*,⁴² although this does not appear clearly from the ruling. The circumstances were as follows:

By an order of the *Byrett* in its capacity of court of examination and summary jurisdiction the appellant was remanded in custody for a specific period. The appellant brought an interlocutory appeal against the said order to the *Lagmannsrett* and further to the Interlocutory Appeals Committee of the Supreme Court.⁴³ The appellant contended that the judge who had pronounced the said order for remand in custody in the Court of Examination and Summary Jurisdiction was disqualified from being president of the Court in the case relating to an extension of the term of security measures. More specifically the appellant contended that by making the order for a remand in custody, the judge had made up his mind as regards the very issues that relate to the conditions for an extension of the term of security measures. He had made up his mind as regards the relationship to Article 4(1) of the Seventh Protocol, and the risk of recidivism, it was asserted, and he had considered it probable that the case would end in an extension of the term of security measures. The judge had therefore considered so many aspects of the case that he must be regarded as disqualified to hear the case, cf. section 108 of the Courts of Justice Act and Article 6 of the Convention. In particular, the *Hauschildt Judgment* was invoked.

The Committee first ruled that according to section 171(1)(3) of the Act of Criminal Procedure it is a condition that remand in custody "... is deemed to be necessary in order to prevent him from again committing a criminal act" It appeared from the *travaux préparatoires* of the Act that this provision means that there must be "... a high degree of preponderance of probability" that the convicted person will commit new felonies if he is released before

legislation of a number of countries belonging to the same culture, countries which also have acceded to the European Human Rights Convention. This is hardly immaterial to the considerations of a matter of international law." Here cited in English from Application No. 11045/84, cf. 42 D.R., pp. 251 f., which application the Commission declared inadmissible.

⁴¹ Case No. lnr 470/1990, jnr 247/1990.

⁴² Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989) (see *infra* section 8.4 and chapter 16).

⁴³ See the ruling of the *Høyesterett's* Interlocutory Appeals Committee of 16 March 1990 (Case No. lnr 471/1990, jnr 289/1990) (see *supra* section 6.3).

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the case is decided.⁴⁴ In the order for a remand in custody this condition had been found to be satisfied. It stated that there was "a great preponderance of probability" of new criminal acts being committed. The Committee then went on:

"The question whether there is a risk of recidivism must be a crucial factor in deciding whether there are grounds for continued preventive supervision [security measures]. Since the examining judge has in the remand proceedings already had to decide whether there is a strong risk of recidivism and has found this to be the case, this will make it difficult for him not to proceed on the basis that a risk of recidivism exists which provides grounds for continued preventive supervision in a subsequent case relating to preventive supervision.

The Interlocutory Appeals Committee has therefore concluded that the district judge should withdraw from the case relating to preventive supervision, cf. section 108 of the Courts of Justice Act."⁴⁵

The ruling is to a very large extent similar to the *Danish* Supreme Court's ruling in UFR 1990.13 which was pronounced a few months before (see *infra* section 8.4). What is common for the rulings is that they both give a broad interpretation of the *Hauschildt Judgment* and apply this broad interpretation of the judgment when construing domestic law. In this ruling it seems to have been so much a matter of course for the Committee the *Hauschildt Judgment* should be applied directly that it did not mention it at all. When one compares the reasoning of the Committee with para. 52 of the *Hauschildt Judgment* it is not difficult to see from where the Committee got its inspiration.

8.3. "Ex Officio" References to the European Convention.

Although the cases discussed in section 8.2.2 have gone quite far in their application of the Convention in domestic law, this has usually taken place on the basis of the parties' submissions. However, in some recent cases it appears as the Court *ex officio* has made references to the Convention. Since in criminal cases the courts are not bound by the parties' submissions as to the law of the case, it is disputable whether or not one should regard the courts' *ex officio* application of the Convention as the expression of an even

⁴⁴ Cf. *Kongeriket Norges Stortings Forhandlinger*, Odelstings Proposition No. 53 (1983-84), pp. 164 f.

⁴⁵ Here cited in English from Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), Doc. Cour (90) 64 rev.

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greater willingness to apply the Convention than that which follows from cases in which a party has invoked one or more of its provisions. On the other hand, such *ex officio* reference to the Convention shows at any rate that the courts regard the Convention, when relevant to the case at issue, as a source of law which they must include in their reasoning together with other relevant domestic sources of law.

UfR 1989.928 concerned the question of whether or not the courts had subject-matter jurisdiction to review certain legal questions, related to the social authorities' decisions to remove children from their homes without the consent of the holder(s) of parental rights.⁴⁶ The majority of the High Court had, on the basis of an interpretation of the Social Assistance Act (Act No. 333 of 19 June 1974), established that it had subject matter jurisdiction to review the questions raised in the case at issue. A unanimous *Højesteret* upheld this decision with reference to its grounds but added that, apparently *ex officio*, the provisions in Chapter VII of the Social Assistance Act should be interpreted in accordance with the European Court's decisions on similar questions.

In NJA 1984.903 *Högsta Domstolen* seems definitely to have dissociated itself from, *inter alia*, its own previously strong *obiter dicta* statements on the *transformation theory*.⁴⁷ The question at issue was a request from the Italian authorities for the extradition of a Canadian citizen who had been convicted *in absentia* in Italy. It appears from the decision that the Court *ex officio* discussed whether the trial in Italy was in accordance with the guarantees stipulated in Article 6(3) of the Convention. On the relationship between the Convention and domestic *Swedish* law, the Court stated:

"Although the Conventions thus have not been incorporated into domestic law, *Sweden's* affiliation to them should... be assumed to underline the importance of *Sweden* not accepting, in the course of applying *Swedish* law concerning extradition, a judgment *in absentia* which was produced under conditions that are irreconcilable with fundamental principles of the legal order in the Realm and *furthermore irreconcilable with Sweden's obligations under the said provisions*" (emphasis added).⁴⁸

⁴⁶ The High Court's decision is reported separately in UfR 1988.404.

⁴⁷ Cf. Sundberg (1988), p. 202.

⁴⁸ [Ehuru således konventionerna inte införlivats med svensk lag får Sveriges anslutning till desamma [...] anses understryka vikten av att Sverige vid tillämpning av svensk lag rörande utlämning inte godkänner en utevarodom som tillkommit under förhållanden som är oförenliga

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This attitude seems to be a return to a more open attitude *vis-à-vis* the Convention in domestic *Swedish* law. Thus, the judgment shows that before *Swedish* courts it is of great importance to know and invoke the Convention.⁴⁹ *Högsta Domstolen* has in two subsequent decisions confirmed this view.

In NJA 1989.131 the crucial question was, briefly speaking, what should be understood by "deprivation of liberty" under Chapter 2, section 9, of the Instrument of Government. To answer this question the Court got considerable guidance from the Convention:

"In this connection certain provisions of the European Convention are also of [some] interest; even though the Convention does not form part of *Swedish* law, it is natural that its position in questions of rights *influences the interpretation of the Instrument of Government* [...]

Some guidance for the judgment could be derived from the European Court's practice regarding the meaning of the conception of deprivation of liberty, *something which has decisive significance also for the application of the Convention in a case like the present one*" (emphasis added).⁵⁰

The Court then went on to discuss the case-law of the European Court, in particular the *Guzzardi Case*,⁵¹ and concluded on this basis that there was no "deprivation of liberty" within the meaning of Chapter 2, section 9, of the Instrument of Government in this case. Accordingly, it follows from the Court's line of reasoning that the Convention was ascribed considerable, possibly decisive, significance in the interpretation of the relevant domestic constitutional provision.⁵²

med grundläggande principer för rättsordningen här i riket och tillika oförenliga med Sveriges åtaganden enligt nämnda konventioner.)

⁴⁹ Cf. Tomas Nilsson: *Mänskliga rättigheter i Högsta Domstolen*. [Human Rights in the Supreme Court], Advokaten 1985, pp. 171 ff.

⁵⁰ [I detta sammanhang är också vissa bestämmelser i europakonventionen av intresse: även om konventionen inte utgör svensk rätt är det naturligt att dess ståndpunkt i rättighetsfrågor påverkar tolkningen av regeringsformen [...]

En viss ledning för innebörden av begreppet kan hämtas från Europadomstolens praxis angående innebörden av begreppet frihetsberövande, något som får avgörande betydelse också för konventionens tillämplighet i fall som det aktuella.]

⁵¹ Cf. Eur. Court H.R., *Guzzardi Case*, Series A, Vol. 39 (1981).

⁵² In *Högsta Domstolen's* judgment of 11 May 1990 (Case No. 93/90) the minority, in its dissenting opinion, referred to the European Court's decision in the *Unterpertinger* and *Kostovski* cases in the same way as to a domestic precedent.

8.4. Judgments from the European Court of Human Rights as Precedents in Domestic Law.

When the European Commission or Court has decided a case to which the *Danish, Norwegian or Swedish* State has been a party the question of what significance should be ascribed to the decision in the domestic application of law arises. Article 53 of the Convention prescribes that the judgments of the European Court shall be considered binding in respect to the Respondent State and only with regard to the specific factual situation at issue in the case in question. But what is the situation if no measures have been taken on the legislative or administrative level? Are judgments of the Court considered precedents in domestic law?⁵³ How can the normative effects of the judgment in subsequent cases before the *Scandinavian* courts be described? This question is first and foremost interesting when the State is found to have violated the Convention, yet it may also provide the Court with an argument in its application of domestic law in cases in which the State is not found to have violated the Convention. *Scandinavian* case-law is not particularly rich in cases which illustrate the impact of a judgment from the European Court on domestic law, but a few very recent decisions are certainly interesting in this respect.

After the operation of the provisional act on compulsory civilian service for dentists in *Norway* mentioned in NRT. 1961.1350 (see *supra* section 6.3) had been prolonged, the *Norwegian* Association of Dentists launched a (new) case on the constitutionality of the Act and its compatibility with Article 4 of the Convention. In the *Høyesterett's* decision in NRT. 1966.935 Justice *Heiberg*, speaking for a unanimous court, held:

"The Provisional Act of 21 June 1956 relating to compulsory public service by dentists is contrary neither to section 105 of the Constitution, nor to Article 4 of the Convention, which prohibits forced or compulsory labour. In this connection, the Court refers to the grounds on which, on 17 December 1963, a majority of the European Commission of Human Rights declared inadmissible, as manifestly ill-founded, application no. 1468/62 by *Iversen against Norway*. Since the Acts of 29 June 1962 and 25 June 1965, which are complementary to the Provisional Act of 1956 (relating to compulsory public service for dentists) do not differ from it in this respect, but merely prolong its operation for successive three-year periods, they cannot be regarded as constituting a violation of the aforesaid Article 4 of the

⁵³ For further information on the question of the precedent value of the European Court, see, for example, Fredrik G.E. Sundberg: *The European Experience of Human Rights Proceedings: the Precedent value of the European Court's Decisions*, 20 *Akron Law Review* (1987), pp. 629 ff.

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Convention.... Then, there is no reason for me to deal with the question whether the Convention would take precedence over the act in the case that a conflict between these had existed."⁵⁴

Thus the Court made strong efforts to establish that there was no conflict between domestic law and the Convention. The comprehensive discussion of the Convention shows that it was considered a domestic source of law, even though the domestic statute left no doubt as to its interpretation.

Moreover, it was stated that the Convention should also be considered as a means for interpreting the Constitution. This is an interesting statement; in particular if one compares this statement with the general statements in the subsequent NRt. 1976.1. In this case, concerning the constitutionality of an act on compensation for expropriation, both the majority and the minority in the *Høyesterett* stated that the exercise of judicial review of legislation should vary in intensity depending on what kind of rights the case at issue concerns. Justice *Blom*, who delivered the majority opinion, said:

"However, there are differences of opinion as to how much is required before the Courts may set aside an Act of legislation as being in breach of the Constitution. I do not feel called upon to discuss this issue in general terms. The solution will to some extent depend on which constitutional provisions we are dealing with. If we are concerned with provisions protecting the personal freedom of the individual or his security, I assume that the supremacy of the Constitution must prevail. If, on the other hand, we are concerned with constitutional provisions regulating the way the other Powers of State have organized their administrative procedure or internal sphere of competence, I agree [...] that the Courts must to a large extent respect the particular views of the Storting (Parliament) itself. Constitutional provisions protecting economic rights must by and large occupy a middle position between these two examples."⁵⁵

Thus the impact of individual and political rights was considered to be stronger on the Legislature's margin of appreciation than the impact of economic rights, *i.e.* as reflecting what in constitutional theory is known as the *preferred position principle*.⁵⁶

⁵⁴ Here cited in English from Drzemczewski (1983), p. 310.

⁵⁵ Here cited in English from Rolv Ryssdal: *The Relation between the Judiciary and the Legislative and Executive Branches of the Government in Norway*, North Dakota Law review 1981, pp. 527, at p. 533.

⁵⁶ The case is discussed by Johs. Andenæs: *Grundlovtolkning, domstoler og politikk. Randbemerkninger til en høyesterettsdom*, [Constitutional Interpretation, Courts and Politics. Marginal Notes on a Supreme Court Judgment], in *Festskrift til Kristen Andersen*, Oslo (

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In NJA 1988.572 *Högsta Domstolen's* line of reasoning was to a large extent founded on the European Court's judgment in the *Ekbatani Case*⁵⁷ to which Sweden had been a party. The circumstances were as follows.

Under Chapter 51, section 21, of the *Swedish Code of Judicial Procedure* the *Hovrätt* may, under certain specified circumstances, dispose of an appeal without a hearing.

In the *Ekbatani case* the European Court had held:

"31. The Court has on a number of occasions held that, provided there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue [...]

32. Here, the Court of Appeal was called upon to examine the case as the facts and the law. In particular, it had to make a full assessment of the question of the applicant's guilt or innocence [...] The only limitation on its jurisdiction was that it did not have the power to increase the sentence imposed by the City Court.

However, the above-mentioned question was the main issue for determination also before the Court of Appeal. In the circumstances of the present case that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offence [...] - and by the complainant. Accordingly, the Court of Appeal's re-examination of Mr. Ekbatani's conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant.

The limitations on the Court of Appeal's powers as a result of the prohibition of *reformatio in pejus* related only to sentencing. They cannot be considered to be relevant to the principal issue before the Court of Appeal, namely the question of guilt or innocence. Neither can the fact that the case-file was available to the public.

33. Having regard to the entirety of the proceedings before the *Swedish* courts, to the role of the Court of Appeal, and to the nature of the issue submitted to it, the Court reaches the conclusion that there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person. Accordingly, there has been a violation of Article 6 § 1."

In the case at issue the appellant, who was not present at the hearing in the *Tingsrätt*, was sentenced to 30 day fines. He appealed against this judgment and requested "... to have a public counsel for the defence from the legal aid

), pp. 19 ff. The preferred position principle in Danish and Norwegian law is discussed by Søren Stenderup Jensen: *Om grundlovsfortolkning*, [On Constitutional Interpretation], 4 Justitia 1984, pp. 5 ff.; and Carsten Smith: *Domstolene og rettsutviklingen*, [The Courts and the Development of Law], Lov og Rett 1975, pp. 292 ff.

⁵⁷ Cf. Eur. Court H.R., *Ekbatani Case*, Series A, Vol. 134 (1988).

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appointed for the hearing before the *Göta Hovrätt*".⁵⁸ The Court of Appeal rejected this request and decided the case without a hearing. *Högsta Domstolen* subsequently overruled the Court of Appeal's ruling as to not having granted a hearing and, consequently, remitted the case to retrial before the Court of Appeal on the following grounds:

"The mentioned rule [Chapter 51, section 21 of the *Swedish Code of Judicial Procedure*] is founded on the view that a party's wish for a hearing should, in principle, be respected. Therefore, there ought to be required strong reasons for considering it manifestly unnecessary to hold a hearing when such one has been requested. Hence a particular restraint in the interpretation of the rule is required with regard to the fact that in its judgment of 26 May 1988 in a case against the *Swedish State* the European Court [of Human Rights] has considered it contrary to Article 6 of the European Convention of Human Rights that in its application of Chapter 51, section 21, of the Code of Judicial Procedure in its wording applicable until 1 July 1984,⁵⁹ a *Hovrätt* has decided a criminal case without a hearing, despite the fact that the accused had requested such a hearing (*Ekbatani Case*...)." ⁶⁰

The fact that *Sweden* was found guilty of having violated the Convention in the *Ekbatani Case* seems to have had such impact on *Högsta Domstolen* that it was willing to revise its previous practice; in the *Ekbatani Case* the Court had upheld the *Hovrätt's* decision to decide the case without a hearing. However, this did not require that any domestic statutory rule was set aside, so it is probably most appropriate to view the decision as expressive of a very extensive application of the *principle of presumption*.

On the other hand, there can be little doubt that the Court treated the judgment from the European Court in the *Ekbatani Case* as a true precedent, *i.e.* the decision - and consequently the Convention - was given direct effect

⁵⁸ [... att få offentlig försvarare enligt rättshjälpen till förhandling i Göta hovrätt].

⁵⁹ On this point, *Högsta Domstolen* is probably mistaken since the European Court emphasized that it was reviewing the compatibility of Chapter 51, section 21, in its wording after the amendment in 1984 with the Convention, cf. Eur. Court H.R. *Ekbatani case*, Series A, Vol. 134 (1988), para. 19.

⁶⁰ [Den angivna regeln bygger på uppfattningen att parts önskemål om huvudförhandling i princip skall respekteras. Det bör därför fordras starka skäl för att anse det uppenbart obehövt att hålla huvudförhandling när sådan har begärts. En särskild restriktivitet vid tolkningen av regeln är numera påkallad med hänsyn till att Europadomstolen genom dom den 26 maj 1988 i ett mål mot svenska staten ansett det stridande mot artikel 6 i Europakonventionen om de mänskliga rättigheter att en hovrätt, med tillämpning av 51 kap 21 § rättegångsbalken i dess före den 1 juli 1984 gällande lydelse, avgjort ett brottmål utan huvudförhandling, oaktet den tilltalade begärt sådan förhandling (*Ekbatani case*...)]

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in domestic Swedish law.

Whether or not a decision of an international court could be implemented in Swedish law without passing legislation was debated strongly in the so-called *Boll Case Discussion* in the late 1950's and early 1960's.⁶¹ As a consequence of this discussion, the question was raised in the *Riksdag* and sent to a parliamentary committee which consulted a number of bodies for their opinion in the matter. On the basis of testimony received, the Committee concluded that judgments from the European Court should be respected in domestic judicial practice in the same way as judgments from domestic instances like *Högsta Domstolen* and *Regeringsrätten*:

"According to the judgment of the Committee it may be taken for granted that a decision from a competent international court, whereby a domestic decision taken by a court or other authority is reversed, should at any rate be attached as much significance for the continued application of law as is ascribed to domestic decisions taken by the final instances. In particular the passing of legislation is accordingly not necessary in order to ensure that international decisions are duly taken into account as guiding for [judicial] practice."⁶²

Justitiekansleren has on one occasion⁶⁴ held that the fact that the European Court has found a violation of the Convention in a case against Sweden is not in itself sufficient to substantiate a claim for damages under the Tort Liability Act of 1972. The applicants, who had been awarded damages in the amount

⁶¹ See Sture Petré: *Barnavårdslagen och förmynderskapskonventionen*, [The Children's Welfare Act and the Convention regulating Guardianship of Minors], SvJT 1959, pp. 201 ff.; Hilding Eek: *Fullgörande av traktatsförpliktelse*, [Fulfillment of Treaty Obligations], SvJT 1959, pp. 561; and Stig Jägerskiöld: *Folkrättsliga plikter och inomstatliga avgöranden. Om resning, prejudikat och skadesånd*, [International Law Obligations and Domestic Decisions. On the Re-opening of Cases, Precedent and Damages], SvJT 1961, pp. 689 ff. For a survey of the discussion, see Sundberg (1986/2), *passim*.

⁶² Cf. Första lagutskottets utlåtande nr. 38, 1961, p. 10. Erik Holmberg & Nils Stjernquist: *Vår författning*, [Our Constitution], 7th edition, Stockholm (1988), p. 181, note that this statement is not in accordance with the prevailing *transformation theory*. However, the statement seems rather to show that the *transformation theory* was not in accordance with the parliamentary practice of the early 1960s.

⁶³ [Enligt utskottets bedömmande kan det tagas för vist, att en behörig internationell domstols utslag, varigenom ett internt svensk avgörande av domstol eller annan myndighet underkänts, skulla komma att tillmätas åtminstone lika stor betydelse för den fortsatta rättstillämpningen som tillkommer interna avgöranden i slutinstanserna. Särskild lagstiftning synes alltså ej erforderlig för att tillförsäkra internationella avgöranden tillbörligt inflytande som vägledande för praxis.]

⁶⁴ Decision of 5 December 1988 (Case No. Dnr 3239-88-40).

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of 200.000 SEK by the European Court,⁶⁵ submitted that the domestic courts had taken decisions contrary to the requirements of the Convention, and that it as a matter of course is incumbent upon the courts to see to it that the Convention is not violated. Accordingly, the judges had rendered themselves guilty of negligence in their exercise of office. *Justitiekansleren* noted that the fact that the European Court has found a specific application of domestic law to be contrary to the Convention does not mean that the domestic decision is repealed or changed: *Sweden* is under international law obliged to bring its domestic legislation in accordance with the Convention.

In the recent UfR 1990.13 the *Danish Højesteret*, including Justice *Erik Riis*, certainly followed the previous line of paying ever more attention to the Convention and dissociated itself from its general statements in the *HT Case*. The circumstances were as follows:

Under section 762 of the *Danish Administration of Justice Act*

"... (2) [a] suspect may furthermore be detained on remand when there is a *particularly confirmed suspicion* ["særlig bestyrket mistanke"] that he has committed

1. an offence which is subject to public prosecution and which may under the law result in imprisonment for 6 years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty, or ..." (emphasis added).⁶⁶

The challenge of a judge was, *inter alia*, governed by section 60 of the Administration of Justice Act. This provision stipulated in sub-sections 2 and 3:

"(2) No one shall act as judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned to be remanded into custody *solely* under section 762(2), unless the case is tried under section 925 or section 925 a [as a case in which the accused pleads guilty].

(3) The fact that the judge may previously have had to deal with a case as a result of his holding several official functions shall not disqualify him, when there is no ground, in the circumstance of the case, to presume that he has any special interest in the outcome of the case" (emphasis added).⁶⁷

⁶⁵ Cf. Eur. Court H.R., *Olsson Case*, Series A, Vol. 130 (1988), para. 102.

⁶⁶ Here cited in English from Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 33.

⁶⁷ *Ibid.*, at para. 28.

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Moreover, the Administration of Justice Act contained in section 62(1) a general clause as to the disqualification of judges:

"(1) The parties cannot only demand that a judge withdraw from sitting in the instances referred to in section 60 but may also object to a judge hearing a case when other circumstances are capable of raising doubt about his complete impartiality. In such instances the judge, too, if he fears that the parties cannot trust him fully, may withdraw from sitting even when no objection is lodged against him. Where a case is heard by several judges, any one of them may raise the question whether any of the judges on the bench should step down on account of the circumstances described above."⁶⁸

The provision in section 60(2) was introduced by an amendment to the Administration of Justice Act (Act No. 386 of 10 June 1987), passed as a consequence of the European Commission's decision on the admissibility of the application of 9 October 1986 in the *Hauschildt Case* in order to fulfil the obligations under Article 6 of the Convention.⁶⁹ The question at issue was whether the fact that a trial judge had taken decisions concerning detention on remand in itself justified fears as to his impartiality. However, in its decision on the merits the Commission did not find that *Denmark* had violated Article 6(1) of the Convention. On the contrary, in its judgment of 24 May 1989 the European Court found that *Denmark* had violated Article 6(1) of the Convention:⁷⁰

"50(3). In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the *Danish* one, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

51. Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr Hauschild's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act [...] Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions [...]

⁶⁸ Ibid.

⁶⁹ Application No. 10486/83.

⁷⁰ Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989).

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52. The application of section 762(2) of the Act requires, *inter alia*, that the judge be satisfied that there is a *particularly confirmed suspicion* that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt [...]. Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes *tenuous*.

The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified" (emphasis added).

In UfR 1990.13 the question was whether the fact that a judge had taken decisions concerning detention on remand, under both sub-section 1 and 2 of section 762 of the Administration of Justice Act, disqualified him from hearing the case as trial judge. As mentioned, in section 60(2) of the Administration of Justice Act it is laid down that if a judge has ordered detention on remand *solely* under section 762(2) of the Act, he cannot hear the case as trial judge. The majority in the *Vestre Landsret* and a unanimous *Højesteret* were of the opinion that the European Court's judgment in the *Hauschildt Case* should be construed in such a way that in general it would be incompatible with Article 6(1) of the Convention if the trial judge had taken decisions concerning detention on remand at a pretrial stage of the case, irrespective of whether the decision has been taken solely under sub-section (2) or in connection with sub-section (1). The crucial question was then what weight should be accorded to the European Court's judgment in the *Hauschildt Case* compared to the provision in section 60(2) of the Administration of Justice Act.

In the High Court one of the three judges established that section 60(2) of the Administration of Justice Act had been passed in order to fulfil *Denmark's* obligations under the Convention. However, in this judge's view the result was that this provision had been worded in a way that made it meaningless in relation to the aim that the *Danish* legislation should fulfil obligations under the Convention. Consequently, this judge held that Article 6(1) of the Convention, as interpreted by the European Court in the *Hauschildt Case*, should prevail over the domestic provision in section 60(2) of the Administration of Justice Act.

The second judge interpreted section 60(2) of the Administration of Justice Act in the light of Article 6(1) of the Convention as interpreted in the *Hauschildt Case*. Consequently, he also found that a judge, having taken

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pretrial decisions concerning detention on remand, was disqualified from hearing the case as trial judge.

The last judge in the High Court would not deviate from the clear wording of the domestic provision in section 60(2) of the Administration of Justice Act. He found that the Legislature had consciously included the word "*solely*" in section 60(2) of the Administration of Justice Act in order to exclude cases in which a decision concerning detention on remand had been taken under both sub-section 1 and 2 of section 762 of the Administration of Justice Act. In other words, he found that it was *clearly indicated* that the Legislature did not want to incorporate Article 6(1) of the Convention completely. Finally, on the general relationship between the Convention and domestic *Danish* law he agreed with *Erik Riis'* statements in the extrajudicial comment on the *HT Case*.

Consequently, the High Court found that the judge who had taken pretrial decisions concerning detention on remand was disqualified from hearing the case as trial judge.

A unanimous *Højesteret* upheld this ruling:

"According to the *travaux préparatoires* of the provision [section 60(2) of the Administration of Justice Act] the *Folketing* was aware of the fact that the European Commission of Human Rights in its decision of 9 October 1986 in the *Hauschildt Case* had unanimously indicated that the present *Danish* system posed serious questions as to the interpretation and application of Article 6 of the Convention.

Hence there is no basis for establishing that section 60(2) of the Administration of Justice Act aims at an exhaustive regulation of the question of a judge's disqualification because during the preparation of the case he has taken decisions concerning detention on remand under section 762(2) of the Administration of Justice Act.

Sections 60(2) and 62(1) of the Act should be interpreted in accordance with the principles laid down in the Court of Human Rights' judgment. Although the judgment is based on concrete grounds and particularly refers to the number of detentions, which the City Court judge, under the investigation, ordered under section 762(2), the judgment must be interpreted in such a way that it will ordinarily not be consistent with Article 6(1) of the Convention that a judge, who prior to the trial has ordered detention under section 762(2), either solely or in connection with other grounds for detention, participates at the hearing of the case. In orders of 21 January, 22 January and 4 February 1988 Judge Henrik Stamp based the detentions on reference, *inter alia*, to this provision and should therefore be regarded disqualified under section 62(1) of the Administration of Justice Act."⁷¹

⁷¹ [Efter forarbejderne til bestemmelsen var Folketinget opmærksom på, at Den europæiske Menneskerettighedskommission af 9. oktober 1986 i Hauschildt-sagen enstemmigt havde givet udtryk for, at den gældende danske ordning rejste alvorlige spørgsmål med hensyn til

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Thus the *Højesteret* discussed the relationship to the Convention and the *Hauschildt Case* in more explicit terms than it had done on any other previous occasion. What is particularly interesting is that the Court discussed in detail how the European Court's judgment in the *Hauschildt Case* should be interpreted. This is in itself remarkable since the *Højesteret* very rarely enters into such discussions. Moreover, the Court paid considerable attention to the Convention, as interpreted in the *Hauschildt Case*, when interpreting domestic law. The provision in section 60(2) of the Administration of Justice Act had a very clear wording, but the Court was nevertheless willing to disregard this clear domestic provision in order to apply the Convention properly.⁷² As pointed out by *Asbjørn Jensen*, it had otherwise been very easy for the Court to refer to the fact that the European Court generally had approved the *Danish* procedural system as to detention on remand⁷³ and in the case at issue to hold that the judge was not qualified.⁷⁴ On the other hand, as Justice *Torben Jensen* put it in an extrajudicial comment on the case, "[i]t made the decision easier that section 62 (now section 61) is a legal

fortolkningen og brugen af art. 6 i konventionen.

Der er herefter ikke grundlag for at fastslå, at retsplejelovens § 60, stk. 2, tilsigter en udtømmende regulering af spørgsmålet om en dommers inhabilitet som følge af, at han under sagens forberedelse har taget stilling til begæringer om varetægtsfængsling efter retsplejelovens § 762, stk. 2.

Lovens §§ 60, stk. 2, og 62, stk. 1, må fortolkes i overensstemmelse med de principper, der er lagt til grund i Menneskerettighedsdomstolens dom. Selvom dommen er konkret begrundet og navnlig henviser til antallet af fængslingskendelser, som byretsdommeren under efterforskningen afsagde efter § 762, stk. 2, må dommen opfattes således, at det sædvanligvis ikke vil være stemmende med konventionens art. 6, stk. 1, at en dommer, der før domsforhandlingen har truffet bestemmelse om fængsling efter § 762, stk. 2, enten alene eller i forbindelse med andre fængslingsgrunde, medvirker ved sagens pådømmelse. Dommer Henrik Stamp har i kendelser af 21. januar, 22. januar og 11. februar 1988 begrundet fængslinger med henvisning bl.a. til denne bestemmelse og må derfor anses for inhabil efter retsplejelovens § 62, stk. 1.]

⁷² In a ruling of 24 October 1989 (Case No. 3. afd. N nr. 188/1989), i.e. a week before the *Højesteret's* decision in this case, in a similar case the *Østre Landsret* had found that the wording of section 60(2) was so clear that "... the European Court of Human Rights' judgment of 24 May 1989 [was] found to be without significance for the understanding of the clear wording" of the said provision.

[Den europæiske Menneskerettighedsdomstols dom af 24. maj 1989 findes at være uden betydning for forståelsen af den klare ordlyd af bestemmelsen.]

⁷³ Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 50.

⁷⁴ Cf. Asbjørn Jensen: *Den europæiske Menneskerettighedskonventions betydning for strafferetsplejen i Danmark*, [The Impact of the European Convention on Human Rights on Criminal Procedure in Denmark], in *Anklagemyndighedens Årsberetning 1989*, Copenhagen (1990), pp. 7 ff., at pp. 11 f.

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standard without sharp contours."⁷⁵⁷⁶

It appears from the decision that the *Højesteret* in general terms emphasized the *principle of presumption* very strongly: "... the decision was made on the basis of an interpretation of sections 60(2) and 62 as primary sources of law, but in consideration of the international law obligation."⁷⁷⁷⁸ Nevertheless, in its concrete application of the law the *Højesteret* went considerably further and, in effect, disregarded the clear provision in section 60(2) of the Administration of Justice Act. Justice *Torben Jensen* has explained that

"[a]lthough it was clear that a change of the practice up till now would entail serious interference in *Danish* courts' organization of legal work and cause organizational changes and additional expenditure for the judiciary, the *Højesteret* found itself obliged to follow the decision of the [European] Court of Human Rights" (emphasis added).⁷⁹⁸⁰

Thus this case should undoubtedly be regarded as the *Højesteret's* dissociation not only from its statements in the *HT Case*, but also its decision in UfR 1988.307 in which it came to the conclusion that a trial judge who at a previous stage of the proceedings had ordered detention on remand was not disqualified from hearing the case as trial judge.⁸¹

Against this background it is probably fair to view this decision as the definitive break-through for the application of the Convention in domestic

⁷⁵ Cf. Torben Jensen: *Domstolenes retsskabende, retsudfyldende og responderende virksomhed*, [The Courts' Law-Making, Law-Interpreting and Opinion-Giving Activity], UfR 1990 B, pp. 441 ff., at p. 446. The exposition has the form of an article on the courts' law-making activity, but is, in effect, an extrajudicial comment on UfR 1990.13 and UfR 1990.181 (see *infra*).

⁷⁶ [Det lettede afgørelsen, at § 62 (nu § 61) er en retsstandard uden skarpe konturer.]

⁷⁷ Ibid.

⁷⁸ [... blev afgørelsen truffet ved en fortolkning af retsplejelovens §§ 60, stk. 2, og 62 som primære retskilder, med hensyntagen til den folkeretlige forpligtelse.]

⁷⁹ Ibid.

⁸⁰ [Selv om det var klart, at en ændring af hidtidig retspraksis ville medføre et alvorligt indgreb i danske domstoles tilrettelæggelse af retsarbejdet og medføre organisatoriske forandringer med merudgifter for justitsvæsenet, fandt Højesteret sig nødsaget til at følge Menneskerettighedsdomstolens afgørelse op.]

⁸¹ In the subsequent UfR 1990.634 the *Højesteret* found, without making express references to the Convention, that a judge, who in a telephone conversation with the counsel for the defence concerning the appointment of the trial had mentioned the possibility of remanding the accused in custody, was disqualified from hearing the case as trial judge.

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Danish law.

Only a few months later in UfR 1990.181 the *Højesteret* was again faced with question of the impact of the *Hauschildt Case* on domestic *Danish law*. In this case the problem was whether the fact that, in a complex of criminal cases concerning the same group of persons, a judge who had heard the case as a trial judge against one of the accused subsequently was disqualified from hearing the case as trial judge against another accused (on the same counts) in the same complex of cases. In addition, before the *Højesteret* it was further submitted that, since the judge who heard the case as a trial judge had previously taken decisions on detention on remand relying on both subsection 1 and 2 of section 762 of the Administration of Justice Act, she was disqualified from hearing the case as a trial judge. However, it should be observed that both the City Court and the High Court's rulings that they were not disqualified to hear the case were passed before the European Court had decided the *Hauschildt Case*.

In its unanimous judgment the *Højesteret* first laid down that in *Denmark* it had so far been considered entirely adequate that the same judge deals with a case at all stages of the proceedings. In this way the judge was obtaining a sufficient knowledge of the case in order to pass a correct judgment. In addition, this way of organizing the work within the courts was both time and work-saving. This applied in particular to cases concerning a large number of crimes and/or accused. Insofar as such cases were not joined into one case, it sometimes happened that facts established in the first case adjudicated, once more were subjected to the assessment of evidence in a subsequent case. The fact that a judge who heard the first case as a trial judge subsequently heard a case against another accused in the complex of cases had in *Danish law* not been considered a circumstance which in itself could raise doubts as to the judge's impartiality and thus disqualify him from hearing the case, cf. section 62 of the Administration of Justice Act. The Court then went on:

"In the light of the European Court of Human Rights' judgment of 24 May 1989 in the *Hauschildt Case* it may be questionable whether this practice is in accordance with Article 6 of the European Convention on Human Rights. In consideration of the very far-reaching consequences for the judiciary in this country, which such an interpretation would cause, notably as far as it concerns single-judge courts, the *Højesteret* considers, however, that it ought to be left to the Legislature to take a position on this question. It should hereby be observed that there is not seen to exist any decision on the part of the Human Rights Commission or Court which takes a position on the question of the competence to act in a case as the present one, and

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that the doubts which has been raised in any case, under the present circumstances, cannot bring about the annulment of the judgments, where, before the High Court, a complete new hearing has taken place, cf. section 965 a of the Administration of Justice Act, with the participation of judges to whose impartiality no objections have been raised" (emphasis added)⁸².

The *Højesteret*'s reasoning in the cited passage is indeed interesting. Although the *Højesteret* expressed doubts as to the compatibility in general of this particular area of domestic procedural law with Article 6 of the Convention, it follows from the last sentence that, under the present circumstances, the *Højesteret* did not find that there was any conflict between the Convention and the way in which domestic law was applied. Both as regards the fact that the trial judge had previously heard cases against other accused in the complex of cases and the fact that she had relied on both subsection 1 and 2 in section 762 of the Administration of Justice Act when ordering detention on remand, the *Højesteret* held that any possible violation of Article 6(2) of the Convention in the first instance should be considered "repaired" by the complete new hearing before the High Court. This is probably a valid interpretation of Article 6(2) of the Convention and the *Hauschildt Case*, since it is difficult to judge the exact scope of this judgment in relation to similar cases.⁸³ Nevertheless, the Court chose to address the question of the compatibility of domestic law with Article 6(2) of the Convention to the Legislature. Although the *Højesteret* on a few previous occasions had explicitly addressed questions to the Legislature, it was rare that the Court decided to do so. This seems to have taken place in cases in which the *Højesteret* has considered the *Folketing* a more appropriate forum for dealing with the question at issue.⁸⁴ Thus it seemed as if the *Højesteret*, on

⁸² [I lyset af Den Europæiske Menneskerettighedsdomstols dom af 24. maj 1989 i Hauschildt-sagen må det stille sig tvivlsomt, om denne praksis er i overensstemmelse med art. 6 i Den Europæiske Menneskerettighedskonvention. Under hensyn til de meget vidstrækkende konsekvenser for domstolsorganisationen her i landet, som en sådan fortolkning ville medføre, navnlig for så vidt angår enedommerembeder, finder Højesteret imidlertid, at det bør overlades til lovgivningsmagten at tage stilling til dette spørgsmål. Det bemærkes herved, at der ikke ses at foreligge nogen afgørelse fra Menneskerettighedskommissionen eller --domstolen, som tager stilling til habilitetsspørgsmålet i en sag som den foreliggende, og at den tvivl, som er rejst i hvert fald ikke kan medføre en ophævelse af dommene under de foreliggende omstændigheder, hvor der i landsretten har fundet fuldstændig ny domsforhandling sted, jf. retsplejelovens § 965 a, under medvirken af dommere, mod hvis upartiskhed der ikke er rejst indvendinger].

⁸³ Cf. Torben Jensen, op.cit., p. 447.

⁸⁴ Another example of a case in which the *Højesteret* explicitly addressed a question to the

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the basis of its own interpretation of the Convention and the *Hauschildt Case*, predicted that in the future the European Court would pass judgments according to which it would be questioned whether the *Danish* procedural system is compatible with the Convention. The *Højesteret* therefore recommended that the question of judges' competence to act, due to "the far-reaching consequences for the judiciary", be considered by the Legislature before *Denmark* actually became party to a case involving the question.

The fact that the *Højesteret* chose to address to the Legislature the question of judges' competence to act did not prevent it from applying the Convention directly in the case at issue. Strictly speaking, the Court's doubts as to the compatibility of *Danish* law with the Convention in general as regards the judges' competence to act in complexes of cases then appears to be an *obiter dictum*. This *obiter dictum* is both wise and relevant here. In a legal system such as the *Danish* one with a very large number of single-judge courts⁸⁵ it would require a fundamental change of the judiciary if judges were only considered competent to act in one case within a complex of cases.⁸⁶

A comparison between the decisions in UfR 1990.13 and UfR 1990.181 gives an idea of how far the *Danish* courts consider themselves entitled to go in their application of the Convention.⁸⁷ UfR 1990.13 concerned a question fairly similar to the one adjudicated in the *Hauschildt Case*, which required that the judge at issue should be considered disqualified from hearing the case as trial judge. This had some serious consequences for the organization of the work of the Judiciary, but these consequences were, however, manageable. The impact of the *Hauschildt Judgment* on a situation as the one in UfR 1990.181 would not, on the other hand, have been obvious, nor would the complications for the Judiciary have been manageable, had the Court found that a judge could only hear one case in a complex of cases. A question with such far-reaching consequences is, of course, more suited for legislation than for judge-made law. At any rate it is probably fair to

Legislature is UfR 1975.763 which concerned the question of open files regarding medical journals.

⁸⁵ Single-judge courts constitute 67 of the 82 jurisdictions in *Denmark*, where, according to the Administration of Justice Act, there is only one judge for the trial of criminal cases.

⁸⁶ Cf. Ole Agersnap: *Anmeldelse af kommenteret retsplejelov, 4. udgave*, [Review of the Administration of Justice Act With Comments, 4th edition], UfR 1990 B, p. 24.

⁸⁷ Cf. Torben Jensen, *op.cit.*, p. 447.

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conclude from UfR 1990.13 and UfR 1990.181 that *Danish* courts are obliged to apply procedural rules in accordance with not only the rules of the Convention, but also the interpretation of these rules following from the European Court's judgments.⁸⁸

8.5. Tentative Conclusions.

Scandinavian courts have on a number of occasions applied directly international law in general and the Convention in particular. The intensity of this application of international law varies from ascertaining that a specific interpretation of domestic law is not contrary to the Convention, to regarding international law as sufficient authority for pronouncing the death penalty. However, the very fact that the courts embark upon discussing the relationship between domestic law and international law shows that international law is regarded a *source of law* in domestic law. That the courts on some occasions (the *Københavns Byret's* judgment of 25 April 1966, UfR 1990.13 and NRt. 1984.1175), in the case of a conflict between the Convention and domestic law have, in effect, made the Convention prevail over domestic law is not only further proof that the courts regard the Convention a source of law in domestic law, but also that the position of the Convention in the domestic norm-hierarchy is significant. This question will be elaborated in section 10.2.

Recently, in some cases the courts have made *ex officio* references to the Convention when dealing with a question of domestic law. This probably demonstrates stronger than anything else that the courts consider the Convention a source of law in domestic law.⁸⁹ Similarly, the courts have recently become extremely aware of the European Court's judgments involving the country at issue. Thus the courts have discussed and interpreted Strasbourg case-law more explicitly than they have ever done with domestic precedents. Therefore, there can be no doubt that the courts feel very bound by these judgments, and both the *Danish Højesteret* and the *Swedish Högsta Domstolen* have been willing to revise their own case-law as a consequence of the judgments from the European Court.

⁸⁸ Cf. Asbjørn Jensen, op.cit., p. 13.

⁸⁹ Cf. Rehof & Trier (1990), p. 90.

CHAPTER 9

The Position of the European Convention in Relation to the Exercise of Discretionary Powers by Administrative Authorities

9.1. Introduction.

In the preceding chapters an examination has been made of the courts' application of the Convention and international law in general. However, from a practical point of view it is the decision-making of the administrative authorities which is far more voluminous than that of the courts. Accordingly, it may be assumed that these make decisions touching upon rights guaranteed by the Convention more frequently. It is obvious that they, with some minor modifications deriving from the *principle of legality* (see *infra* section 10.2), are obliged to follow the general principles on the relationship between domestic law and the Convention set forth by the courts. The question is, however, whether administrative authorities have further obligations as regards the Convention.¹

In section 2.2 it was stated that the strong emphasis in *Denmark* on the administrative authorities' obligation to exercise their discretionary powers in accordance with undertaken international obligations (*the rule of instruction*) is not found in *Norway* and *Sweden* to the same extent. In this chapter the position of the Convention in relation to administrative decision-making is examined further. Since there are some significant differences between *Denmark*, *Norway* and *Sweden* in this respect, each country is examined separately.

9.2. Denmark.

In the above-mentioned memorandum from the *Danish* Ministry of Justice

¹ It should be noted that in this context the Ombudsman Institutions, which are empowered to supervise administrative authorities' exercise of their powers, play a particularly prominent role. For a discussion of the interaction between the *Scandinavian* Ombudsmen and the European Commission, see Eilshou Holm (1986); Gaukur Görundsson: *Den nordiske ombudsmandsinstitution og Den europæiske Menneskerettighedskonventions organer*, [The Nordic Ombudsman Institution and the Organs of the European Convention on Human Rights], paper presented at the 32nd Nordic Meeting of Lawyers, Reykjavík 1990; and *The Danish Ombudsman. Material in English*, published by the Danish Ombudsman, Copenhagen (1990).

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on constitutional problems raised by accession to the EEC (see *infra* section 2.2) it was stated, although in vague terms, that administrative authorities should exercise their discretionary powers in such a way that administrative acts, whether they be *specific decisions or general regulations*, conform to validly contracted international obligations.² This is now known as the *rule of instruction*.

In support of this assumption on *general regulations*, reference was made to section 5(1) of the Act on Legal Responsibility of Ministers. Under this provision it is an offence for a Minister "... if he willfully or by gross negligence disregards the obligations incumbent upon him under the Constitution, under statutory law or by virtue of his office."³⁴ The carrying out of appropriate measures, aiming at preventing the State of *Denmark* from violating international law in the application of international law at the domestic level, would normally seem to be an obligation incumbent upon any minister "by virtue of his office", provided that the measures concerned are authorized by law, and that the risk of infringements occurring as a result of an omission to make the necessary adjustments cannot be dismissed as remote.⁵

On a similar basis, any minister should be held under a legal obligation to refrain from employing his rule-making powers, including his power to amend existing administrative regulations, in a manner that, in effect, would make the continuous implementation of an international commitment impossible in the domestic legal order. This obligation should be considered enforceable also under Article 63 of the Constitution⁶, setting aside, if necessary, the domestic provision found to be incompatible with a duly contracted

² Cf. the Ministry of Justice (1971), p. 78. This view was originally introduced by Ole Espersen (1970), pp. 380 ff.

³ Cases against ministers are only indictable in impeachment proceedings before *Rigsretten* [the High Court of the Realm], composed of all the Justices of the *Højesteret* and an equal number (15) of lay assessors, the latter elected by the *Folketing* for 6 years at a time, cf. Articles 59 and 60 of the *Danish Constitution*.

⁴ [... hvis han forsætligt eller af grov uagtsomhed tilsidesætter de pligter, der påhviler ham efter grundloven eller lovgivningen i øvrigt eller efter hans stillings beskaffenhed.]

⁵ Cf. the Ministry of Justice (1971), pp. 75 ff.

⁶ Under Article 63 of the *Danish Constitution* "... the courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power", cf. Blaustein & Flanz, *Binder IV*, October 1990, p. 22.

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international obligation.⁷

From a practical point of view, however, it is of greater interest to consider what the position is when the exercise of discretionary powers relates to making *decisions in individual cases*. As mentioned, the Ministry of Justice assumed that also in individual cases administrative authorities were required to exercise their discretionary powers in such a way that these decisions were compatible with concluded, but not incorporated, treaties. This view was illustrated by the following example:

"Under section 5 of the Act of 1952 [now repealed (see *supra* section 4.2.1)] on Aliens's Entry into and Residence in *Denmark*, an alien might be expelled by administrative order under conditions in items (1) to (5) and also "...when his circumstances otherwise justify it". This provision delegated to the *Danish* Ministry of Justice a fairly wide discretionary power to take decisions on the expulsion of aliens. However, an unrestricted exercise of that power might in certain circumstances be held to be in conflict with *Denmark's* obligations under Article 8 of the European Convention on Human Rights, which provides that "everyone has the right to respect for his family life, his home and his correspondence". At any rate, the European Commission of Human Rights has examined several cases in order to decide whether the expulsion of an alien married to a national of a specific country which results in a separation of the spouses, was justified by consideration of *ordre public* and national security, which under Article 8(2) may justify interferences with family life. Under the doctrine outlined above, the *Danish* Ministry of Justice should be held legally bound under domestic law to exercise its discretionary power of expulsion with respect *inter alia* to any limitations inherent in Article 8 of the European Convention on Human Rights."⁸

The courts had until recently not had a chance to decide definitively whether and, if so to what extent, ministers and administrative authorities were limited under *Danish* law in the exercise of their discretionary powers by concluded, but not incorporated, treaties. However, the available case-law contained statements suggesting that the courts would accept the view put forward by legal scholars and the Ministry of Justice.

In the unreported case of the *Københavns Byret* from 1966, a circular which contained an interpretation of a provision in the Administration of Justice Act was set aside by the Court on the basis of an interpretation of Article 6(3)(e) of the ECHR (see *supra* section 8.2.2). In UfR 1948.837, which

⁷ Cf. the Ministry of Justice (1971), p. 81 note 39.

⁸ See the Ministry of Justice (1971), pp. 77 f. Here cited in English from Eilschou Holm (1986), p. 92.

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concerned the extinction of a horse commandeered by the German occupying power during World War II, it was established that public authorities are obliged to apply domestic rules of extinction in accordance with undertaken international obligations (see *supra* section 7.3). Similarly, in UfR 1975.30, the *Højesteret* found that the Danish Broadcasting Company was under a legal obligation to apply the Copyright Act in a way which conformed to the Bern Convention (see *supra* section 5.2).

Although these decisions did not explicitly state that administrative authorities were under a legal obligation to exercise their discretionary powers in conformity with undertaken international obligations, it seems fair to interpret them as expressive of the existence of such a duty.

However, the recent decision from the *Østre Landsret* in UfR 1989.775 seems finally to have established that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations.

Under section 9(3) of the present Act on Alien's Entry into and Residence in Denmark the Directorate of Aliens is, when granting a residence permit to a relative of a person living in *Denmark* with status as refugee, entitled to demand as a condition for granting the residence permit that the person in *Denmark* with status as refugee undertake the maintenance of the relative. However, under the said provision, this can only be demanded on the basis of a concrete discretion in each individual case.

In the case at issue, the Directorate of Aliens had found that an Iranian family consisting of a mother and two grown up sons being educated in *Denmark*, all of whom were living on supplementary benefits and student grants, would not be able to support the applicant who was the mother of the woman. Accordingly, the Directorate refused to grant her a residence permit in *Denmark*. This decision was subsequently upheld by the Ministry of Justice on appeal. However, in the period in which the applicant had been in *Denmark*, the family had actually maintained her, just as they were willing to continue to maintain her. In both instances the applicant pleaded that the Directorate of Aliens was under a legal obligation to exercise its discretionary powers with respect to *Denmark's* international obligations, including Article 8 of the ECHR and a number of recommendations from the UNCHR.

Retten i Korsør expressed itself very clearly as to the Directorate of Aliens' obligation to exercise its discretionary powers in accordance with undertaken international obligations saying that

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"... it cannot be assumed that the rule should be administrated in a such way that here-living refugees, solely on the grounds of lack of economic means, should be prevented from being reunited with their parents, since this would be inconsistent with those humanitarian considerations, recommended by the UN, and the respect of the individual's rights, which is embodied in Article 8 of the European Convention on Human Rights, since refugees have no other countries than the country of residence in which they can enjoy these rights."⁹

Subsequently, it was laid down that demanding that the family in *Denmark* should undertake maintenance of the applicant was unwarranted. The Court was therefore apparently of the opinion that there existed a conflict between the Convention and *Danish* law as interpreted by the Directorate of Aliens.

The *Østre Landsret* upheld this latter ruling, but on different grounds. Unlike the City Court, the High Court did not find that the invoked international obligation, generally speaking, should hinder a demand that refugees in *Denmark* undertake the maintenance of their relatives. Since the available information showed that it was a firm practice that the Directorate of Aliens demanded that refugees should undertake the support of relatives applying for a residence permit in *Denmark*, no individual discretion had been exercised in the case at issue. Consequently, the Directorate's decision was unlawful under *Danish* law.

The High Court seems to have decided the case on the basis of domestic law. On the other hand, it did not dissociate itself from the City Court's statements of the Directorate's duties as to the administration of section 9(3) of the Aliens Act. Accordingly, this case may, in effect, be considered a judicial affirmation of the view that *Danish* administrative authorities are under legal obligation to exercise their discretionary powers in conformity with undertaken international obligations.

Folketingets Ombudsmand has on different occasions and in different forms held quite clearly that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the Convention.

"In this context, it is", as pointed out by Dr. *Niels Eilschou Holm*, "recalled that the Ombudsman performs a dual function: that of passing on

⁹ [... det kan ikke antages at reglen skal administreres på en sådan måde, at herboende flygtninge alene p.g.a. manglende økonomisk evne skal være afskåret fra familiesammenføring med forældre, idet dette strider mod de humanitære hensyn som FN anbefaler og den respekt for individets rettigheder, som er nedfældet i den europæiske menneskerettighedskonventions artikel 8, idet flygtninge ikke har andre lande end opholdslandet at nyde disse rettigheder i.]

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individual complaints aimed at contended errors or other shortcomings on the part of administrative authorities; and that of setting and/or promoting new standards aimed at enhancing the protection of the individual in his dealings with those authorities. The Ombudsman is not, in his exercise of either of these functions, bound to follow those strictly legal considerations, which may make the quarry, or parts of it, off-limits to judges."¹⁰

The latter fact suggests that the Ombudsman also holds a more free position than the courts in relation to the application of the Convention. Thus the Ombudsman has stated in general terms that

"[i]t is unobjectionable for the Ombudsman to make use of this freedom [...] Those principle views on the relationship between the State and the individual, which formed the basis of the implementation of the European Convention on Human Rights, and which are reflected in the subsequent development of the individual provisions of the Convention, are to a large extent simply identical to those considerations which underlay the creation of the office of *Folketingets Ombudsmand* when the Constitution was amended in 1953, and which the activity of the office aims constantly at considering."¹¹¹²

Accordingly, the Ombudsman must also in the exercise of his functions review whether the provisions of the Convention, when relevant to the case at issue, "... have formed part of the relevant administrative authority decision-making process with the weight which valid *Danish* law provides for."¹³¹⁴ This view is reflected in some of the Ombudsman's decisions in concrete cases.¹⁵ Moreover, the Ombudsman has on some occasions

¹⁰ Cf. Niels Eilshou Holm: *The Ombudsman and Human Rights*, Report presented at the Third International Ombudsman Conference, Stockholm 1984, p. 47.

¹¹ Cf. *Folketingets ombudsmands beretning*, [Annual Report of the Parliamentary Ombudsman], 1986, p. 12.

¹² [Det er ubetænkeligt at gøre brug af denne frihed [...] De principielle synspunkter på forholdet mellem statsmagten og den enkelte, der dannede grundlag for gennemførelsen af den europæiske menneskerettighedskonvention, og som afspejles i den videreudvikling af konventions enkelte bestemmelser, som finder sted i konventionsorganernes praksis, er simpelthen sammenfaldende med de hensyn, der lå bag oprettelsen af embedet som folketings ombudsmand ved grundlovsrevisionen af 1953, og som embedets virksomhed fortsat tilstræber at tilgodese.]

¹³ Ibid.

¹⁴ [... er indgået i den pågældende forvaltningsmyndigheds beslutningsproces med den vægt, som gældende dansk ret giver mulighed for.]

¹⁵ See *Folketingets ombudsmands beretning*, [Report of the Parliamentary Ombudsman], 1982, p. 9, cf. p. 136; and 1988, p. 93.

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recommended that a statutory or administratively issued provision is brought into harmony with the obligations deriving from the Convention.¹⁶

Finally, it should be noted that on a number of occasions the *Danish* Government has maintained that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the obligations following from the Convention. In, for example, the initial report of the *Danish* Government under Article 40 of the UN-Covenant the following statement was made:

"The principle of equality before the law though expressly embodied in its general form in neither the Constitutional Act nor in any other enactment, is regarded as a general principle of *Danish* law. It serves, in particular, to restrict the exercise of discretionary powers by administrative authorities, central and local. However, *Danish* law on the effect in general on domestic law of a validly concluded treaty implies *inter alia* that administrative authorities in their exercise of discretionary powers shall ensure that administrative acts - whether in the form of decisions or general regulations - conform to validly contracted international commitments. That is deemed to be a legal obligation enforceable by judicial review under Section 63 of the Constitutional Act, according to which the courts of justice are entitled to decide any question bearing upon the scope of the Executive. To that extent Article 26 of the Covenant can be regarded as having been "incorporated" into domestic *Danish* law."¹⁷

9.3. Norway.

In the *Alta Case* in NRt. 1982.241 (see *supra* section 6.3) it was established that *Norwegian* administrative authorities are obliged to exercise their discretionary powers in accordance with undertaken, but not incorporated, human rights conventions. Furthermore, in this case the *Høyesterett* stated that "... the rules concerning the courts' power to review the validity of administrative acts do not prevent the Court from fully and comprehensively considering whether the expansion works violate rules of international law." As mentioned, it is normally assumed that *Norwegian* courts are not entitled to review the administration's exercise of so-called "free discretion". Accordingly, the rules of international law do not form part of "free discretion" which are the exclusive competence of the administration. It is

¹⁶ See *Folketingets ombudsmands beretning*, [Report of the Parliamentary Ombudsman], 1984, p. 205; and 1987, p. 147.

¹⁷ Cf. UN-doc. CCPR/C/1 Add. 51 (concerning the principle of equality before the law under Article 26 of the Covenant). See also the *Danish* Government's pleadings on the admissibility in the *Case of Kjeldsen, Busk Madsen and Pedersen* (see *infra* section 17.2.1).

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probably realistic to view this statement as implying that *Norwegian* administrative authorities are under a legal duty to exercise their discretionary powers not only in accordance with undertaken international obligations in the field of human rights, but in accordance with international law in general. In the *Case of E v. Norway* before the European Court (see *infra* chapter 16 and section 18.4), the *Norwegian* Government pleaded strongly that if administrative authorities have not included the Convention when taking discretionary decisions, the courts can set aside such decisions.

Accordingly, Professor *Carl August Fleischer* has suggested that in an administrative situation in which lower authorities need an order from a superior authority as the basis for their actions, the very information from the superior authority that a specific treaty has been entered into is in itself a command within the chain-of-command equivalent of a more formal order.¹⁸

Stortingets ombudsmann for forvaltningen has neither in general terms nor in concrete cases stated anything on the legal position of the Convention in relation to the exercise of discretionary powers by administrative authorities.¹⁹

9.4. Sweden.

Regeringsrättens decision in the *Råneå Case* in RÅ 1974.121 (see *supra* section 6.2) laid down that administrative authorities were under no legal obligation to exercise their discretionary powers in accordance with undertaken, but not incorporated, international obligations. As mentioned, this decision was subsequently subjected to strong critique by legal scholars (see *supra* section 6.2). Thus Professor *Hilding Eek* commented upon the decision more indirectly; in a new edition of a book on the sources of law he wrote:

"From the point of view of both international and national interests, it is of course important that it is made clear to the authorities which apply the law *that* the rules of law which are to be valid within the country pursuant to a treaty that is binding upon the state, are to be applied by them on the same level and under the same conditions as "domestic law", as well as *what* these rules contain. A successful handling of this information activity is, of course, not only of great practical value, but may also be apt to remove a possible existing imagination among these authorities that they should be *under duty* not to apply a treaty which had been ratified by *Sweden* and which had entered into force, but which had not been "transformed",

¹⁸ Cf. *Fleischer* (1984), p. 256.

¹⁹ Cf. letter to the author of 15 January 1991 (Lnr. 292/90 OO/th).

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thereby exposing the realm as such to responsibility for breach of international law."²⁰

The decision in the *Råneå Case* seems not to have been challenged in subsequent judicial practice as regards administrative authorities' obligations in relation to the Convention. However, it may be assumed that the fact that Swedish courts recently have become more favourably disposed towards to Convention in general (see *supra* chapter 8) will also have an impact on how the courts view administrative authorities' obligations in this respect. Furthermore, a development away from the restricted view on the possibility of administrative authorities applying the Convention can be found in other contexts.

In the *Skoogström Settlement* it was, *inter alia*, laid down that

"... the Government has seen to it that the National Board of the Judiciary [*Domstolsverket*] and the Chief Prosecutor [*Rigsåklagaren*] will publish a summary of the Commission's report so as to enable the judiciary and the prosecutors to avoid repeating in the daily performance of their duties situations which have been found by the Commission to constitute a violation of the said Article."²¹

In order to implement the undertaking that the National Board of the Judiciary and the Chief Prosecutor were to publish a summary of the European Commission's report for the purpose of avoiding future similar violations, Mr *Peter Löfmarck* from the Department of Justice wrote an article under his own name about the *Skoogström Case* in Strasbourg and the Swedish rules on arrest and detention.²² In this article, *inter alia*, published in the official publications of the National Board of the Judiciary and the Chief Prosecutor,²³ it was said:

"The determination by the European Commission only addresses the question whether in an individual case of violation of the Convention has taken place, there is not any determination whether the legislation in a country is reconcilable with the Convention. One will have to conclude, however, from the cases now reported that the

²⁰ Cf. Hilding Eek et alii: *Juridikens källmaterial* [The Sources of Law Material], 8th edition, Stockholm (1975), p. 56. Here cited in English from Sundberg (1988), p. 201.

²¹ Cf. Eur. Court H.R., *Case of Skoogström & Case of McCoff*, Series A, Vol. 83 (1984), p. 9.

²² For further information, see Hans Corell: *Incorporation of the European Convention of Human Rights from a Swedish Point of View* in Rehof & Gulmann (1989), pp. 156 f.

²³ Cf. *Domstolsverket informarer*, 1984:4, and *RÅ-nytt*, 1984:4 respectively.

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Swedish rules, at least in the way they are often applied in practice, cannot be reconciled with the Convention. Consequently the rules have to be changed.

The work of the [*Swedish*] commission is now carried on with a view to regulating of the coercive measures against persons in a way that satisfies the requirements of the Convention.

In the meantime it is desirable that the authorities apply the present rules, as far as possible, in such way that there will be no conflict with the European Convention [...] As matters now stand, however, one will nevertheless, within the framework of the present rules, have to try to arrive at an adaptation as close as possible to the requirements of the Convention [...]

It is important, however, that the authorities charged with the application make themselves familiar, as soon as possible, with what the decision of the European Commission means in their case. It may then be useful that the authorities consult each other at a local level in order to arrive at a common system that will work in practice. The more the police, the prosecutors and the courts take into consideration the standards insisted upon by the European Convention when they apply the present rules, the more supple will be the transition to a new system."²⁴

Since the article was part of a friendly settlement between the applicant and the State of *Sweden*, supervised by the European Court, and thus undoubtedly expressive of the Government's view, although strictly related to the case at issue, it is probably fair to view the cited statements as having a more general validity. It was, on the one hand, laid down that treaties, as a general rule, must be incorporated into domestic *Swedish* law in order to have domestic effects. To the extent that such incorporation has not taken place, it was suggested that administrative authorities were, on the other hand, under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations.

In a handbook on administrative rule-making,²⁵ published by the Cabinet Office subsequent to the *Skoogström Settlement*, it is stated:

"... that the possibilities of an authority to determine rules freely may be restricted also by the undertakings which *Sweden* has assumed by international agreements [...] Those undertakings that follow from an international agreement do not as such mean any limitation in the formal sense of rule-making powers to the authorities. Rules that have been issued in conflict with an international agreement which has not been incorporated into *Swedish* law are therefore not *per se* null. Another matter is that *Sweden* may be guilty of a violation of its international obligations by making regulations by means of its internal rule-making which are in violation of the

²⁴ Here cited in English from Jacob W.F. Sundberg: *Human Rights in Sweden. The Annual Reports 1982-84*, Stockholm (1985), p. 74.

²⁵ Cf. *Statsrådsberedningen. Myndigheternas föreskrifter. Handbok i författningsskrivning*, Stockholm (1986).

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country's international agreements. This may mean the risk of counter-action by other countries or may incur their disapproval."²⁶

This statement, seen in connection with the *Skoogström Settlement*, has led Professor *Jacob W.F. Sundberg* to the conclusion that "... in summary, should a governmental authority deviate from the European Convention in the exercise of its discretion, the decision may well suffer revision by being taken up to the Government by appeal, but the Government will not criticize the lower authorities but simply change the decision."²⁷

Justitiekansleren has not taken any decisions regarding the obligation of administrative authorities to include the Convention in the exercise of their discretionary powers.²⁸

In a recent decision of 26 September 1990²⁹ one of *Rigsdagens Ombudsmän*, *Hans Regnemalm*, confirmed that an administrative authority cannot, generally speaking, be criticized for not having included the Convention in the exercise of its discretionary powers. In the case, the Ombudsman held that *Swedish* law within the field at issue fulfils "with a good margin" the Committee of Ministers' Recommendation No. R (85) 13. However, the Ombudsman used the case at issue as an opportunity to give a general statement on the Convention's status in relation to administrative authorities' exercise of their administrative powers.

It follows from Chapter 12, Article 6, of the Instrument of Government that the main task of *Rigsdagens Ombudsmän* is the supervision of the application in public service of laws and other statutes. Hence the question is, briefly speaking, whether the Convention should be considered as a "law or other statute". The Ombudsman answered this question in the negative:

"Under *Swedish* law it is not the business of *Swedish* courts or administrative authorities to apply the provisions of conventions directly, except when they have been incorporated into the *Swedish* legal order by means of domestic rule-making in accordance with Chapter 8 of the Instrument of Government; another case is that - since a certain scope for interpretation or filling up of a domestic regulation exists - as far as possible one seeks to reach a result which lies in line with international law obligations of the country. Thus *Rigsdagens Ombudsmän* cannot criticize an authority

²⁶ Here cited in English from Sundberg (1988), p. 206.

²⁷ Ibid.

²⁸ Cf. letter to the author of 28 December 1990 (Dnr 3663-90-19).

²⁹ Case No. Dnr 2477-1990.

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that it has not, by disregarding *Swedish* law, applied the provisions of the Convention [...] The responsibility for the fulfilment of the obligations under the Convention lies primarily with the highest state organs which are exempted from the supervision of *Rigsdagens Ombudsmän*, *Riksdagen* and the Government, which through rule-making - directly or indirectly - have to incorporate the commands of the Convention in the domestic legal order and thus harmonize this one with the Convention.³⁰³¹

Accordingly, the Ombudsman cannot criticize an authority for not having applied the Convention directly,³² since the authority is not under a legal obligation to review the compatibility of the statute at issue with the Convention. This statement is simply a confirmation of the *transformation theory* and the *principle of presumption* in relation to administrative decision-making. As regards the specific question of whether or not administrative authorities are under a legal obligation to include the Convention in the exercise of their discretionary powers, it is probably fair to conclude that no such obligation exists in *Sweden* in the view of the Ombudsman.³³ The emphasis put on the *principle of presumption* suggests, however, that administrative authorities within *Swedish* law have firm possibilities of using the Convention in the exercise of their discretionary powers. In comparison with the most recent court practice on the application of the Convention in *Sweden* (see *supra* chapter 8) this view seems to be somewhat restricted.

On the other hand, the Ombudsman emphasized that he has the power to draw the attention of the *Riksdag* to any divergence between *Swedish* law and

³⁰ *Ibid.*, at pp. 4 f.

³¹ [Det ankommer enligt svensk rätt inte svenska domstolar eller förvaltningsmyndigheter att direkt tillämpa konventionsbestämmelser, utan dessa måste genom normgivning enligt 8 kap. RF först ha införlivats med den svenska rättsordningen; en annan sak är, att man - då visst utrymme för tolkning eller utfyllnad av en inhemsk föreskrift föreligger - i görligaste mån söker nå et resultat, som ligger i linje med landets folkrättsliga förpliktelse. JO kan alltså inte kritisera en myndighet för att den inte med åsidosättande av svensk lag tillämpat konventionsbestämmelser [...] Ansvaret för att förpliktelseerna enligt konventionen fullgöres åvilar i första hand de från JO:s tillsyn undantagna högsta stasorganen, riksdagen och regeringen, som genom normgivning har att - direkt eller indirekt - införliva konventionens bud i den inhemska författningsregleringen och sålunda harmonisera denna med konventionen.]

³² *Ibid.*, at p. 5.

³³ Fredrik G.E. Sundberg: *Om ingripanden mot administrativt frihetsberövande i ett rättighetsperspektiv*, [On Interference against Persons Administratively deprived of their Liberty - in a Rights Perspective], *Förvaltningsrättslig tidskrift* 1983, pp. 200 ff., at p. 202 ff., advocates that administrative authorities should be considered under a legal obligation to include the Convention in their decision-making. Similarly, Hilding Eek, Ove Bring & Lars Hjerner: *Folkrätt*, [Public International Law], 4th edition, Stockholm (1984), p. 261, who moreover assume that administrative authorities in fact use international treaties in the performance of their duties.

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the Convention, and that in fact he does so from time to time.³⁴

9.5. Tentative Conclusions.

It follows from the discussion in this chapter that *Danish* and *Norwegian* administrative authorities are under a legal obligation to include the Convention, whenever relevant to the case at issue, in the exercise of their discretionary powers. This obligation is subject to judicial review under Article 63 of the *Danish* Constitution and the unwritten *Norwegian* principle of judicial review of administrative action. Compared to *Denmark* and *Norway* the legal position in *Sweden* in this respect is less clear. However, the tendency seems to be, as in the other *Swedish* cases concerning the ECHR, to pay more attention to the Convention now than previously. On the other hand, it is not possible to say in clear terms that under *Swedish* law administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the Convention; the decision of 26 September 1990 of Ombudsman *Hans Regnemalm* does not suggest that such an obligation exists.

³⁴ Ibid.

CHAPTER 10

Conclusions to Part III

10.1. The Application of the European Convention in Domestic Law: a Brief Survey.

From the case-law discussed in chapters 5-9 it follows that *Scandinavian* courts frequently apply international law - and in particular the ECHR - when deciding a case. These decisions concern a number of very different questions, and international law has been applied to a different extent in the individual cases. However, one common feature is manifest: *the courts do not recognize conflicts between international law, as they interpret this, and domestic law*. Consequently, with a few exceptions, the courts have managed to avoid taking a stand on how a (clear-cut) conflict between international law, including the Convention, and domestic law should be resolved. These exceptions have, however, to a very large extent been *obiter dicta* statements; it appears that the courts have in only three instances (UfR 1974.263 in *Denmark*, NRt. 1957.942 in *Norway* and RÅ 1974.121 in *Sweden*) expressly let domestic law prevail over the treaty provision as part of the *ratio decidendi* of the judgment. And of these three instances did only RÅ 1974.121 concern the ECHR. This is quite remarkable. In spite of this, the courts have on a number of occasions in substance and, in the most recent cases also in form, or explicit terms, applied the Convention directly. Where there was previously a tendency only to ascertain that the domestic solution found did not violate the Convention (international law), there is now a tendency to embark on discussions on the application of the Convention and Strasbourg case-law. There can be no doubt that the Convention is an international instrument, with considerable and substantial force at the domestic level also. Even so, the number of reported cases in which the Convention has been referred to is in absolute terms low, although in comparison with other international instruments it is by far the most applied treaty in domestic law.

With the exception of the *Swedish* judgments in AD 1972 No. 5, NJA 1973.423 and RÅ 1974.121 and the *Danish* judgment in UfR 1986.898 (see *supra* section 6.2) there is, generally speaking, a firm practice of paying more and more attention to the Convention in domestic legal decisions from the highest instances. Thus the cases in which most significance has been

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ascribed to the Convention are from 1988 onwards.

However, in the period from 1974 and to *Högsta Domstolen's* judgment in NJA 1984.903, *Regeringsrätten's* decision in the *Råneå Case* in RÅ 1974.121, which was the judicial affirmation of the *transformation theory*, was the leading precedent concerning the application of the Convention in Sweden. Under this theory the impact of the Convention on domestic Swedish law was quite insignificant. In 1981, the year in which Sweden was found to have violated the Convention in the *Sporrong and Lönnroth Case* (see *infra* sections 18.2 and 18.3), *Regeringsrätten* examined in RÅ 1981 2:14 (see *supra* section 6.3) whether domestic law was compatible with the requirements of the Convention and seems thus to have become more open *vis-à-vis* the Convention.¹

It is difficult to say whether it was the *Sporrong and Lönnroth Case*, the increase of Swedish complaints to the European Commission, or a combination of different factors, which motivated this change of attitude within the Judiciary. Professor Jacob W.F. Sundberg has explained this change by a combination of different factors: (1) "grievances accumulated" in the Swedish society under the Social Democratic Government of Mr Oluf Palme; and (2) "breaking the bureaucratic wall" by different "break-in tools" such as breaking "citation cartels", breaking the "media wall", establishing a "human rights law moot court competition", "friendly settlements", the *Sporrong and Lönnroth Case*, the "European limelight", "advocate pleading" and the activity of the Council of Legislation.² Whether or not this observation accurately reflects the change in the Swedish legal practice lies outside the framework of the present study.

The Norwegian courts appeared, until recently, to have been more willing to apply the Convention than its Danish and Swedish counterparts, but the Danish and Swedish courts now tend to show a more or less similar willingness to apply the Convention (see *supra* section 8.4). This applies in particular to the Danish courts which at the moment seem to be very determined to give the Convention a stronger position in domestic law.

¹ In these years, the number of complaints (provisional files) directed against Sweden to the European Commission rose from 42 in 1981 to 72 in 1982, 240 in 1983, 192 in 1984 and 168 in 1985. The number of registered files were in the same period 8 in 1981, 18 in 1982, 46 in 1983, 51 in 1984 and 64 in 1985, cf. European Commission of Human Rights: *Stock-Taking on the European Convention on Human Rights*, 1954-1984 and 1986.

² Cf. Jacob W.F. Sundberg: *The Swedish Experience of the European Convention: the View from beneath*, 24 *Akron Law Review* (1987), pp. 649 ff.

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Apart from the above observations, the available case-law can hardly be said to be a basis for drawing clear and unambiguous conclusions on the application of international law in general and the ECHR in particular in domestic *Scandinavian* law. However, it is certainly possible to point to some trends in the practice of the courts:

(1) In deciding a case the courts apply international law as *law* and *not as facts*.³

(2) There is apparently no difference in the courts' application of customary international law and treaties.

(3) The distinction between the *rule of interpretation* and the *rule of presumption*, in an analytical sense, does not reflect practice. This applies to both the criterion for making the distinction between the rules and the assumption that the *rule of presumption* cannot be applied to treaties which are more recent than the statute in question.⁴ Thus, in UfR 1972.600 the *Højesteret* has applied a treaty which was more recent than the Administration of Justice Act. Nevertheless, from a more practical point of view it may be useful to use this distinction because, in spite of all, it highlights whether the vague *principle of presumption* is applied as a principle of interpretation or as the legitimation for deviating from the wording of a domestic legal rule.

(4) In some cases the courts have applied international law to a greater extent than international law has itself required. This has been designated as *enforcing international law in domestic law*. The question of international law as a *source of law* in domestic law is very interesting since an application of this type goes considerably farther than what is presupposed in the *principle of presumption*.

(5) In *Denmark* and *Norway* it is clearly established that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations - be they incorporated or not - whereas in contemporary *Swedish* law there seems to be only a tendency to recognize such obligations.

Against this background it may be concluded that the *European Conven-*

³ Cf. Espersen (1970), p. 396; and Smith (1968), pp. 183 f.

⁴ Cf. Rehof & Trier (1990), p. 85 note 73, with reference to Søren Stenderup Jensen: *Folkeretten som retskilde i dansk ret*, [International Law as a Source of Law in Domestic Danish Law], UfR 1990 B, pp. 1 ff., at p. 9.

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tion on Human Rights is a source of law in domestic Scandinavian law.⁵ However, this source of law appears at the moment to be slightly more forceful in *Denmark* and *Norway* than in *Sweden*.⁶

Thus the Convention has not, as Judge *Pierre Pescatore* has put it, "... remained a dead letter, at least judicially," in the *Scandinavian* countries.⁷

Hence the relevant question is what weight should be accorded to the ECHR when in conflict with domestic law? This question will be discussed in section 10.2.

One could, however, have wished that considerations regarding the relationship between international law and domestic law, which in individual cases undoubtedly support the assumption that domestic law should conform to international law, had been expressed more clearly in the judgments. This (previous) lack of explicit discussion of the position of the ECHR in domestic law seems to have caused some doubt as to the domestic fulfilment of the obligations under the Convention. However, in the most recent case-law the courts seem to have changed their attitude and in fact discussed and applied the Convention.

⁵ Cf. Trond Dolva: *Internasjonale menneskerettighetskonvensjoner og intern norsk rett*, [International Human Rights Conventions and Domestic Norwegian Law], TfR 1990, pp. 121 ff., at p. 128; Gulmann (1983), p. 51; and Smith (1968), p. 183.

Gulmann, Bernhard & Lehmann (1989), p. 95, state: "There is solid background in legal [Danish] practice for such a view." Similarly, Aall (1989), p. 637, who concludes as regards *Norwegian* law: "Today it is completely unproblematic to establish that human rights conventions are relevant sources of law (factors) in our domestic application of law."

Fleischer (1984), p. 251, recognizes that international law is a source of law in domestic law but considers it nevertheless more appropriate to stick to the traditional terminology. The fact that international law has only significance in domestic law through the *principle of presumption* expresses, in Fleischer's opinion, an important reality.

Opsahl (1979), p. 176, on the other hand, in a 1979 article held that "[a]t present this power [to apply international obligations directly] is very questionable, and indeed is not clearly established in practice in any *Nordic* country, despite recommendations in legal writing and certain suave but non-committal statements by persons in important positions."

For an opposite view, see Ole Espersen: *Den europæiske Menneskerettigheds forhold til dansk ret*, [The relationship between the European Convention on Human Rights and Danish Law], *Juristen* 1966, pp. 401 ff., at p. 412.

[Der er i retspraksis solid baggrund for en sådan opfattelse.][Det er i dag helt uproblematisk å slå fast at menneskerettighetskonvensjonene er relevante rettskildefaktorer i vår nasjonale rettsanvendelse.]

⁶ For a somewhat different view, see Bertil Bengtsson: *Om domare och rättskällor*, [On Judges and Sources of Law], TfR 1989, pp. 686 ff., at p. 691, who explains that it is not possible to find any concrete example that the Convention should have influenced *Högsta Domstolen* in any significant way, although there is an increasing tendency to invoke the Convention before the Court.

⁷ Cf. *Pierre Pescatore: Conclusion* in Jacobs & Roberts (1987), pp. ? ff., at p. 278.

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Finally, it should be mentioned that the terminology in this particular field of law *de lege feranda* in itself has some impact on the application of the Convention and other treaties. This is explained clearly by Professor *Claus Gulmann*,

"... there can, however, be no doubt that the acceptance of international law as a source of law may have a psychological effect. It may help to change the general attitude of lawyers towards international law. It may help to make them understand that they cannot limit themselves to an examination of domestic sources of law. They will have to broaden their search for pertinent rules to the international sphere. An acceptance may also help to form a new conceptual basis for a broader application of non-incorporated international law within the *Danish* legal order."⁸

10.2. The Weight of the International Sources of Law.

Since in nearly all the available *Scandinavian* judgments no conflict between international law and domestic law was assumed, it is not possible, in general terms, to draw conclusions as to the weight of the sources of international law which are not unambiguous. However, a few indications (some of them concerning the ECHR) of how the courts may be expected to resolve such conflicts have emerged from the individual cases. Thus, in UfR 1974.263, NRt. 1957.942 and RÅ 1974.121 (see *supra* section 6.2), the courts let a treaty provision yield to a domestic statutory provision, whereas a circular was, in effect, set aside in the unpublished decision of 25 April 1966 from the Københavns Byret (see *supra* section 8.2.2). In UfR 1990.13 (see *supra* section 8.4) a clear statutory domestic provision was disregarded, and this was probably also the case in NRt. 1984.1175 (see *supra* section 8.2.2). Finally, in UfR 1986.898, the *Højesteret* refused to review directly whether domestic rules were compatible with the European Convention (see *supra* sections 5.2.1 and 6.2). Likewise, *Swedish* courts have in a number of *obiter dicta* stated that non-incorporated international law must yield to domestic statutory law (see *supra* section 6.2). But these indications do not provide any basis for general guidelines in the solution of conflicts between international law and domestic law.

The writers who have asserted that international law is a source of law in domestic *Danish* law have assumed that, with regard to its position within the domestic norm-hierarchy, it should only yield to a domestic statutory provision if regard for it means that the Legislature's intentions are not being

⁸ Cf. Gulmann (1987), p. 34.

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carried out.⁹ However, this view leaves ample room for the interpretation of the Legislature's intentions and says in fact only a little about how such conflicts should be solved.

In principle it is probably possible to go one step further and recognize that nothing unambiguous can be concluded from Article 19 of the *Danish* Constitution, from Article 26 of the *Norwegian* Constitution and from the Chapter 10, section 2, of the *Swedish* Instrument of Government on whether international law can be applied directly.¹⁰ The only *fundamental* restriction on the law-enforcing authorities' application of international law is the *principle of legality*: international law *cannot* substitute the requirement of statutory authorization laid down in this principle.¹¹ This view has reasonable support in the available case-law.

Hence the question is how strong is the impact of the *principle of legality* in this context?

With the exception of *Sweden*, the *principle of legality* is unwritten in *Scandinavian* law. In Chapter 8, section 3, of the *Swedish* Instrument of Government the principle is expressed in the following way:

"Provisions concerning the relation between private subjects and the community which regard obligations incumbent upon private subjects or which otherwise interfere in the personal or economic affairs of private subjects shall be laid down by law.

Such provisions are, *inter alia*: Provisions regarding criminal acts and the legal consequence of such acts, provisions regarding taxes payable to the State, and provisions regarding requisition and other such dispositions."¹²

The principle has a slightly different scope depending on whether it is applied by administrative authorities or by the courts.

In making decisions *administrative authorities* are bound by the *principle of legality* in such a way that any administrative act must be based on *law*

⁹ Cf. Espersen (1970), p. 388; Gulmann (1987), p. 34; and Holst-Christensen (1989), p. 49.

Zahle (1986), Vol. 3, p. 129, puts forward a principle of primacy of the statute and states in this connection *that* this principle applies solely to recognized conflicts between international law and domestic law; *that* it only applies to the legislation; and *that* the principle of legality must be fulfilled.

¹⁰ Cf. Zahle (1986), Vol. 3, p. 113.

¹¹ Cf. Smith (1968), p. 183.

¹² Cf. *Constitutional Documents of Sweden*, published by the *Swedish Riksdag*, Stockholm (1981).

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understood as *valid law* and must not be contrary to formal law, *i.e.* legislation.¹³ From a more practical point of view one can say that, as a general rule, administrative acts shall have positive authorization in a source of law. This applies to both the factual and legal aspects of the administration's activity. As regards measures which infringe upon the rights of the individual, it is laid down in the principle that statutory authorization is required. In practice, general administrative regulations are issued with statutory authorization.

The exact scope of the principle is not clear, nor is the requirement as to the character and strength of the statutory authorization well-defined. It is probably fair to say that the more heavy-handed an encroachment is upon the individual, the more distinct is the requirement for clear statutory authorization.

Consequently, the *principle of legality* may limit the administrative authorities' application of international law. *International law cannot substitute statutory authorization* in cases in which obligations are imposed on the individual. When it is a question of extending the rights of the individual, as is the case with the ECHR, the scope of the principle of legality is probably more limited.¹⁴ *Jan Erik Helgesen* has expressed the impact of the *principle of legality* in the application of international law on the domestic level in the following way:

"Even if one goes further, but adheres to this point of departure, it is established that the principle of legality does not prevent intervention to the advantage of the citizen or intervention in "the State's own sphere of activity" [*rettsområde*]. Thus, according to this, an international law provision which protects the citizen against the State is relevant without having having been incorporated into *Norwegian law*. In such cases, it has also been held that the international law provision should take precedence, that

¹³ See, for instance, Andenæs (1986), pp. 215 ff.; The Ministry of Justice (1971), p. 70; Kirsten Ketscher & Steen Rønsholdt: *Retsanvendelse og retssikkerhed - en introduktion*, [The Application of Law and the Rule of Law - an Introduction], Copenhagen (1987), p. 22; Bent Christensen: *Forvaltningsret. Hjemmelsspørgsmål*, [Administrative Law. Questions of Legality], Copenhagen (1980), pp. 35 ff.; Jørgen Mathiasen: *Forvaltningsakten* in *Juridisk Grundbog* [Fundamental Legal Book], 3rd edition, Copenhagen 1975, § 9; Zahle (1986), Vol. 3, pp. 18 ff.; Ross (1980), Vol. 1, pp. 233 ff.; Max Sørensen: *Dansk statsforfatningsret*, [Danish Constitutional Law], 2nd edition by Peter Germer, Copenhagen (1973), p. 233, p. 210, p. 342, p. 363, p. 399 and p. 414; Gorm Toftegaard Nielsen: *III. Constitutional and Administrative Law* in Hans Gammeltoft-Hansen, Bernhard Gomard & Allan Philip: *Danish Law. A General Survey*, Copenhagen (1982), p. 49 and p. 51; Opsahl (1979), p. 165; Smith (1968), p. 183; Erik Holmberg & Nils Stjernquist: *Vår nya författning* [Our New Constitution], 2nd edition, Stockholm (1976) p. 124 ff.; and Håkon Strömberg, (1989), pp. 14 f. and 95 f.

¹⁴ See Smith (1968), p. 183; Gulmann (1983), pp. 49 f.; and Madsen (1986), p. 39.

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it should be accorded particularly great weight."¹⁵

However, the European Court has established that some of the provisions of the ECHR have *Drittwirkung*,¹⁶ i.e. these provisions of the Convention do not only protect the individual against the State but also against the actions of other private persons. Thus, the State is under obligation to shape the rule of law in such a manner that no violation of the substantial provisions of the Convention occur in mutual relations between its citizens. Insofar as no domestic measures have been taken in order to incorporate provisions of the Convention having *Drittwirkung*, Scandinavian courts cannot, due to the *principle of legality*, give full domestic effect to such provisions. In addition, it should be observed that it is doubtful whether an incorporation of the Convention in itself would fulfil the requirements as to the clarity of statutory authorization laid down in this respect in the *principle of legality*.¹⁷

On the other hand, administrative authorities are considered legally bound to exercise their discretionary powers in such a way that individual decisions conform to existing international obligations (see *supra* chapter 9).

The *principle of legality* also applies to the courts, albeit with slightly different scope. Generally speaking, the courts do not need an explicit statutory authorization as a basis for their decisions to the same extent as the administrative authorities; they consider themselves entitled to base their decisions on the law understood as *the sources of law*.¹⁸

Within specific areas - such as criminal law and criminal procedure - it is explicitly prescribed in constitutional or statutory provisions that certain encroachments upon the individual by the State can only take place with specific statutory authorization, see e.g. the above cited Chapter 8, section 3,

¹⁵ Cf. Helgesen (1982), p. 86. Here cited in English from Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), Appendices to the Government's memorial.

¹⁶ For a brief account on the concept of *Drittwirkung* - or third-party applicability - see Everet Albert Alkema: *The third-party applicability or "Drittwirkung" of the European Convention on Human Rights* in Matscher & Petzold (1988), pp. 33 ff.

¹⁷ See Asbjørn Jensen in Rehof and Gulmann (1989), pp. 165 f.; and Holst-Christensen (1989), pp. 56 f.

¹⁸ Cf. The Ministry of Justice (1971), p. 71; NOU 1983:87 *Straffelovgivningen under omforming*, [The Penal Legislation under Conversion], p. 115; Ross (1980), pp. 543 f.; and Max Sørensen, *op.cit.*, pp. 157 f.

See also Article 64 in the Danish Constitution: "In the performance of their duties the judges shall be directed solely by the law...", cf. Blaustein & Flanz, *Binder IV*, October 1990, p. 22.

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of the *Swedish* Instrument of Government; Article 96 in the *Norwegian* Constitution and section 1 of the *Danish* Penal Code, which all express the maxim of *nulla poena sine lege*. Outside criminal law and criminal procedure, interpreted in the broadest sense, it is not possible to find such examples.

The following conclusion from the *Danish* Ministry of Justice is probably representative for all *Scandinavian* countries:

"As far as it goes, it can be said that both administrative authorities and the courts must fulfil the requirement that decisions made shall be authorized in "valid law". It is hardly doubted that the courts in this country, if one excludes cases within the criminal procedure, are regarded as entitled to make decisions on a less distinct basis than what would be required of the administration in similar cases."¹⁹

Accordingly, the decisions in NRt. 1946.198, NRt. 1947.434 (see *supra* section 8.2.1) and UfR 1972.600 (see *supra* section 7.3) go too far in the application of international law since in these cases obligations, including the death penalty, were imposed on the individual with authorization in international law only. This lack of domestic statutory authorization in these cases is definitely not in accordance with the *principle of legality*.

Apart from the restrictions following from the *principle of legality*, the view put forward here does not mean that *international law*, in the case of conflict with domestic law, *should prevail absolutely*. Such a conflict must be resolved on the basis of an overall evaluation of the facts of the case - including the different sources of law. As in other cases of conflict between, on the one hand, a statutory rule and, on the other, another source of the law, it is certain that the statutory rule will carry considerable weight. But the considerations pointing in the opposite direction may carry such weight that a total evaluation makes the international law rule prevail.

Thus, *the lex specialis* and *the lex posterior derogat legi priori* principles will give some guidance in resolving a conflict between international law and domestic law, whereas *the lex superior principle* will normally be applied in such a way that it is assumed that international law, by definition, is holding a lower position in the norm-hierarchy than legislation. This is expressed very

¹⁹ [For så vidt kan det siges, at der både for administrative myndigheder og for domstolene gælder et krav om, at trufne afgørelser skal have hjemmel i "gældende ret". Der er dog næppe tvivl om, at domstolene her i landet, når bortses fra sager indenfor strafferetsplejen, anses for berettigede til at træffe afgørelser på et mindre klart hjemmelsgrundlag end det, der i tilsvarende tilfælde ville blive krævet af en administrativ myndighed.]

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strongly by *Jan Erik Helgesen*:

"I have, however, little use for the *lex superior* principle in the conflict between arguments of international law and arguments of domestic law, because this principle presupposes a relatively clear conception of the placing in the norm-hierarchy. And this is where the misunderstanding arises: the hieratic placing of the systems. That one has applied this principle of conflict of rules on this type of divergency is in my opinion the cardinal mistake."²⁰

Moreover, it is possible to point out some considerations which seem to have had specific significance in the resolving of conflicts between international law and domestic law. These considerations have to some extent been expressed, more or less explicitly, in the available case-law, but are also based on more common considerations:²²

(1) Is the conflict of a *total* or of a *partial* nature? The more limited the conflict is, the easier it is to base the application of the rule of international law on the *lex specialis* principle, cf. NRt. 1908.749, NRt. 1938.584, UfR 1942.1002, UfR 19710.332 and UfR 1982.1128.

(2) The *political and legal* problems which might be involved in a breach of international law, cf. UfR 1942.1002 and UfR 1972.600.

(3) *The strength and the clarity of the international rule*, including the degree of acceptance of the rule by the international community, (cf. the cases concerning the Regulations of Land Warfare and in particular the ECHR). There can be no doubt that the ECHR and other human rights conventions are treaties with a considerable impact on domestic law; this follows very clearly from the available case-law. The Convention is undoubtedly a forceful expression of a legal policy to which the *Scandinavian* countries profess to adhere.

Case-law from the European Court to which the country at issue has been a party has a particularly strong impact on domestic courts. Thus in UfR 1990.13 the *Højesteret* has been willing, in effect, to disregard a clear domestic provision in order to follow the interpretation of the Convention

²⁰ [Lex superior-prinsippet har jeg derimot liten nytte av i kollisjonen mellom folkerettslige og intern-rettslige argumenter, fordi dette prinsippet forutsetter relativt klare oppfatninger om trinnhøyden. Og her kommer misforståelsen - den hierarkiske plassering av systemene - inn med full tyngde. At man har kunnet finne anvendelse for dette kollisjonsprinsipp på denne type motstrid, er etter min mening selve kardinalfeilen.]

²¹ Cf. Helgesen (1982), p. 105.

²² See Smith (1968), pp. 188 ff.

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laid down by the European Court. Similarly, the *Högsta Domstolen* has in such a case paid considerable attention to the Convention, although there has been no question of disregarding the domestic provision.

The former Chief-Justice of the *Høyesterett*, *Terje Wold*, has asserted that since the Convention promises human rights to everybody who lives in the territory, everybody can claim fulfilment of the Convention as a subjective right regardless of the laws of the State. Consequently, the Convention is applicable directly in domestic law and prevails over domestic law in the case of a conflict.²³ Although *Wold's* view *de lege lata* does not reflect the general view in this field, it nevertheless shows how forceful an international instrument the ECHR is considered to be.

Similarly, *Wold's* successor as Chief Justice of the *Høyesterett* and President of the European Court of Human Rights, *Rolv Ryssdal*, has touched upon the question of how *Norwegian* courts would resolve a conflict between the Convention and domestic law:

"I would like to mention that some important human rights, which are not contained in the *Norwegian* Constitution, are now included in international binding conventions on human rights [International Covenant on Civil and Political Rights of 16 December 1966 and the ECHR]. I am not aware of conflicts between existing national legislation and the provisions of the international conventions. If, however, such a conflict should arise, it would be for the courts to decide the conflict, and I think it could be argued that precedence should be given to the convention."²⁴

(4) *The strength and the clarity of the domestic rule*, cf. NRt. 1957.942, RÅ 1974.121, UfR 1974.263 and UfR 1986.898. It should, however, be recalled that the *Swedish* courts have emphasized as *obiter dicta* that incorporation is required if international law is to be applicable directly in domestic *Swedish* law. This may be interpreted as meaning that in *Sweden* domestic law is apparently *per se* regarded as having more strength than international law. But again, the question seems to be more complex; thus in some recent cases

²³ Cf. *Terje Wold: Den europeiske menneskerettighedskonvensjon og Norge*, [The European Convention on Human Rights and Norway], in *Legal Essays. Festskrift til Frede Castberg*, Oslo (1963), pp. 353 ff.

²⁴ Cf. *Rolf Ryssdal: The Relation between the Judiciary and the Legislative and Executive Branches of the Government in Norway*, *North Dakota Law Review* 1981, pp. 534 f. Similarly, *Torstein Eckhoff: Alta-dommen*, [The Alta Judgment], *Lov og Rett* 1982, pp. 339 ff., at p. 352; and *Eckhoff (1987)*, p. 267.

See also *Rolv Ryssdal: Bestand und Bedeutung der Grundrechte in Norwegen*, *EuGRZ* 1978, p. 459, in which he expresses himself in somewhat more guarded terms than in the passage cited above.

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Högsta Domstolen has laid down that the Convention is an important means of interpretation regarding the Instrument of Government.

(5) The domestic rules' *position within the domestic norm-hierarchy*, cf. *Københavns Byret's* judgment of 25 April 1966. Thus Professor *Carsten Smith* has concluded that

"A special act of transformation cannot, contrary to the ordinary opinion, be considered necessary in principle as a condition for the application of international law. Such an act is required only to give the international rule the level in the municipal legal system appertaining to the transformation rule employed."²⁵

As indicated previously, generally speaking, it is probably still fair to conclude that the Convention is regarded as being placed beneath legislation in the domestic norm-hierarchy. But in contemporary case-law there seems to be a tendency to give the Convention the same position in domestic law as legislation, cf. UfR 1990.13 and NRt. 1984.1175. However, one should probably be careful of not thinking too much in terms of a domestic norm-hierarchy when discussing the relationship between international law and domestic law.

(6) Is it possible to *ascertain the Legislature's intentions*? To the extent that these intentions can be ascertained, they will be ascribed considerable significance. This applies both when it is clear that the Legislature intended to fulfil an international obligation completely, cf. UfR 1955.595, UfR 1964.-624, UfR 1975.30, UfR 1979.332 and UfR 1990.13, or when it is *clearly indicated* that the Legislature did not want to implement a treaty obligation completely, cf. NRt. 1957.942 and UfR 1974.263.

The large number of cases in which it has been established that there was no conflict between domestic law and the Convention in particular indicates, however, that it may be questioned whether the very concept of a *conflict of rules* reflects the process which leads the courts to the conclusion that, in the case at issue, there is no conflict between the domestic provision and the rule of international law.²⁶ It appears quite clearly from the case-law discussed in this context that the interpretation of the domestic rule and the interpreta-

²⁵ Cf. Smith (1968), p. 184.

²⁶ Cf. Smith (1980), p. 308.

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tion of the international rule influence each other mutually. This means that the domestic and the international sources of law are harmonized into one process and in the majority of cases, as a result of this harmonization, international law is not found to be in conflict with domestic law. Accordingly, the considerations listed above probably establish more that no conflict exists between domestic and international sources of law than as a guideline for the resolving of such conflicts.

PART IV

The Application of the European Convention in Domestic Scandinavian Law in a Comparative Perspective

CHAPTER 11

The Application of the European Convention in a "Dualist" System: the United Kingdom

11.1. Introduction.

The *United Kingdom* was one of the original signatories of the Convention on 4 November 1950, and its First Protocol on 8 March 1952. Prior to the ratification, the Convention was ordered "to lie upon the table" of the *House of Commons* on 23 January 1953. This was done in accordance with the so-called *Ponsonby rule* (a constitutional usage which is possibly a binding constitutional convention), whereby the texts of international agreements are laid before both Houses of Parliament for the duration of twenty-one days prior to ratification.¹ On 5 February 1951, the Minister of Foreign Affairs stated that "... if no objections are raised, the instrument of ratification will be prepared on or after 21st February". The instruments of ratification of the Convention and subsequently of its First Protocol were deposited with the Secretary General of the Council of Europe on 8 March 1951 and 3 November 1952, respectively. A reservation was made with regard to Article 2 of the Protocol: the States' duty to provide education facilities in accordance with parental convictions was "... accepted by the *United Kingdom* only in so far as it is compatible with the provisions of efficient instruction and training, and the avoidance of unreasonable expenditure". Declarations on the recognition of the compulsory jurisdiction of the European Court of Human Rights and the acceptance of the competence of the Commission to receive individual petitions were made on 14 January 1966.²

In accordance with well-established *British* constitutional practice based upon the concept of Parliamentary sovereignty, the provisions of international agreements ratified by the *United Kingdom* have no internal effect unless they are transformed into domestic law by an Act of Parliament (see *infra* section 11.3). Such implementing legislation was, as in the *Scandinavian* countries, not considered necessary in the case of the ratification of the

¹ See, for example, E.C.S. Wade & A.W. Bradley: *Constitutional and Administrative Law*, 10th edition, London and New York (1985), p. 321.

² See 9 Yearbook (1966), pp. 8 and 14.

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ECHR. At the time of ratification the Government assumed that domestic law was in full conformity with the Convention's provisions, and successive governments have since expressed the opinion that the rights and freedoms enumerated are in all cases already secured by domestic law. As a consequence, the Convention has not acquired a domestic status in the *United Kingdom*, and individuals cannot rely upon it directly before the courts (see *infra* section 12.3). However, the *United Kingdom* has on a number of occasions, usually as a consequence either of cases pending or "lost" before the European Commission and Court, amended existing or passed new legislation in order to comply with the Convention.³

11.2. The Effect of Treaties in Domestic Law.

For centuries customary international law has been regarded as part of the common law and as directly enforceable by *English* courts.⁴ But the *British* approach to treaties has always been distinctly "dualist". As Lord Atkin put it in *Attorney-General for Canada v. Attorney-General for Ontario*: "Within the *British* Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action."⁵ If no such legislation is passed, it is, as Lord Denning M.R. held in *Blackburn v. Attorney-General*, "... elementary that the courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted in Parliament, and then only to the extent that Parliament tells us."⁶

The most common way of incorporating treaties into domestic *English* law is by the *adoption* method,⁷ i.e. the statute gives effect to the treaty as such. In these circumstances and to the extent specified in the statute, the

³ For a general account on the impact of the Convention on the legislative process in the *United Kingdom*, see Clive Symmons: *The Effect of the European Convention on Human Rights on the Preparation and Amendment of Legislation, Delegated Legislation and Administrative Rules in the United Kingdom*, in M.P. Furmston, R. Kerridge & B.E. Sufrin (eds.): *The Effect on English Domestic Law of Membership of the European Communities and of the Ratification of the European Convention on Human Rights*, The Hague (1983), pp. 387 ff.

⁴ See, for example, Lord McNair: *The Law of Treaties*, Oxford (1961), pp. 81 f.; and E.C.S. Wade and A.W. Bradley, *op.cit.*, p. 322.

⁵ Cf. [1937] A.C. 326, at p. 347.

⁶ Cf. [1971] 2 All E.R. 1380, at p. 1382.

⁷ On the terminology regarding the incorporation of treaties, see *supra* section 2.1.

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substantial part of the domestic legislation is the text of the treaty itself: it is the source of law. It happens, however, that treaties are incorporated by being *reformulated* in a domestic statute. "[B]ecause the method of construction to some extent depends on the method of interpretation", Dr. *F.A. Mann* has pointed out that the incorporation of treaties through reformulation, due to the variety of forms these may take, should be clearly distinguished.⁸ Accordingly, he classifies the ways in which treaties are reformulated into the following categories:⁹

- (1) The statute does not refer to the treaty;
- (2) The statute refers to the treaty, but implements it only in part;
- (3) The statute refers to the treaty, but enacts its terms independently; and
- (4) Independent enactment, with the treaty referred to being included as a schedule.

When a treaty has been incorporated into domestic law it is part of the law of the land in exactly the same way that other statutes are. The relationship of treaties to other statutes is, accordingly, the same as the relationship of any two statutes to each other,¹⁰ and the general principles aiming at solving conflicts between two different legal rules apply.

Nevertheless, both incorporated (irrespective of what form this incorporation has taken place in) and unincorporated treaties may under certain circumstances play a role in *English* courts. First of all through rules of statutory interpretation. There is a presumption that Parliament does not intend to legislate contrary to the *United Kingdom's* commitments under international law. According to this principle the courts will construe statutes so as to avoid conflicts with treaty obligations. This principle applies in particular to statutes which are intended to incorporate a treaty, but it does not, generally speaking, limit itself to these situations (see *infra* section 11.3.2), although one may find cases which suggest this. It is possible to talk here about the *principle of interpretative presumption*. This principle appears to be more similar to the *Danish rule of interpretation* than the *Scandinavian*

⁸ Cf. F.A. Mann: *Foreign Affairs in English Courts*, Oxford (1986), p. 97.

⁹ *Ibid.*, at pp. 97 ff.

¹⁰ For a survey, see, for instance, R. Higgins: *United Kingdom* in Jacobs & Roberts (1987), pp. 123 ff., at p. 129.

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principle of presumption (see *supra* sections 2.1 - 2.2), since it is only applicable when the domestic statutory provision is unclear and/or ambiguous. In, for instance, *Salomon v. Commissioners of Customs and Excise* this was illustrated very clearly by *Diplock L.J.*:

"It has been argued that the terms of an international convention cannot be consulted to resolve ambiguities or obscurities in a statute unless the statute itself contains either in the enacting part or in the preamble an express reference to the international convention which it is the purpose of the statute to implement [...] I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligation under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it. Of course the court must not merely guess that the statute was intended to give effect to a particular convention. The intrinsic evidence of the connection must be cogent."¹¹

On the other hand, this principle is only applicable where the words of the statute are unclear or ambiguous. If this is not the case, the text of a treaty cannot be taken into account by the courts, and they will have to disregard any potential conflict with international law. A preliminary, but no less important question, is when the courts can decide to establish that the words of the domestic statute are ambiguous. In fact, in many cases this question is the decisive criterion in relation to whether or not the treaty can be taken into account at all. Moreover, it has from time to time been questioned in legal decisions whether the principle of interpretative presumption is applicable also when not related to statutes incorporating a treaty in one way or another. In *British Airways v. Laker Airways*, a fairly recent case, *Lord Diplock*, speaking of a treaty between the *United Kingdom* and the *United States* relating to air traffic, said, apparently in contrast to his statement in *Salomon*:

"The interpretation of treaties to which the *United Kingdom* is a party but the terms of which have not either expressly or by reference incorporated in *English* domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an

¹¹ Cf. [1967] 2 Q.B. 116, at pp. 143 f.

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English court of law."¹²

This decision has been criticized for not having made a proper distinction between treaties as *a cause of action* (where issues of *justiciability* may arise), and treaties as a means of interpretation in respect of a different cause of action.¹³ The fact that an unincorporated treaty is normally not justiciable has nothing to do with whether or not the treaty can otherwise be considered or interpreted. Moreover, in *Pan-American World Airways v. Department of Trade*, relating to the Civil Aviation Act 1949 which was enacted to give effect to the Chicago Convention, *Lord Denning M.R.*, first rejected the relevance of the Bermuda Convention of 1946 between the *United Kingdom* and the *United States* to the problem in question (this was the treaty *Lord Diplock* had refused to take into account as a means of interpretation in *Laker*) to then immediately proceed to interpret it.¹⁴

To sum up the general position of treaties in domestic *English* law, it may be useful to quote the observations of an expert in the field, *R. Higgins Q.C.*:

"It has to be said that, from the perspective of counsel seeking to introduce treaties into the legal argument, the attitude of the *British* courts is a lottery. The approach will vary from judge to judge; and the case law to date shows striking and unacceptable inconsistency. There has been no inclination shown in the judgments to analyse exactly the nature of the treaty concerned, the functional purpose for which the treaty is invoked; and to draw the legal consequences therefrom. Instead, there are broad dicta offered, most usually unsupported by reasoning, and revealing no consistent practice."¹⁵

11.3. The Application of the European Convention.

11.3.1. The Starting Point.

English courts have on a number of occasions held that the unincorporated ECHR cannot be enforced directly in domestic law, since it has not been incorporated into domestic law by an Act of Parliament. This point is illustrated clearly in the following two decisions:

In *Uppal v. Home Office*, where the applicants, illegal immigrants,

¹² Cf. [1985] A.C. 58, at pp. 85 f.

¹³ Cf. *R. Higgins*, op.cit., p. 133; and *F.A. Mann*, op.cit., p. 94.

¹⁴ Cf. (1976) *Lloyd's Rep.* 257, at pp. 260 f.

¹⁵ Cf. *R. Higgins*, op.cit., p. 131.

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applied for declarations that they should not be deported from the *United Kingdom* until the European Commission had determined whether deportation would violate the right to respect for family life under Article 8 of the Convention, *Sir Robert Megarry V.-C.* held that "... obligations in international law which are not enforceable as *English* law cannot [...] be the subject of declaratory judgments and orders."¹⁶ In the subsequent *Malone v. Metropolitan Police Commissioner* the Vice-Chancellor re-affirmed his decision in *Uppal* after full argument on this point, thus stating that the provisions of the Convention cannot be the source of legal rights enforceable in the *United Kingdom*, since "... that declarations will be made only in respect of matters justiciable in the courts; treaties are not justiciable in this way; the [European C]onvention is a treaty with nothing in it that takes it out of that category for this purpose".¹⁷

The plaintiff was tried on a number of offences of handling stolen property. During the trial it was revealed that the plaintiff's telephone had been tapped by the Post Office on behalf of the police on the authority of a warrant issued by the Secretary of State (the usual procedure). The plaintiff claimed, *inter alia*, that the Crown had no power, either under statute or at common law, to tap telephones, and that Article 8 of the Convention conferred upon him a right to have his "private and family life, his home and his correspondence" respected, or, if it did not confer a direct right, it was at least a guide to the interpretation and application of *English* law.

Both these arguments were rejected by the Court. Though considering in detail the Convention and the judgment of the European Court of Human Rights in the *Klass Case*¹⁸ as well as the procedure for telephone tapping in *Britain*,¹⁹ and though he doubted that the European Court would accept the *British* system,²⁰ in accordance with his above-cited statement *Sir Robert Megarry V.-C.* refrained from ruling on the compatibility with the Convention. The Vice-Chancellor held that since telephone tapping could - as in this case - be carried out without any breach of the law (*i.e.* trespass), it did not

¹⁶ Cf. 21 Yearbook (1978), p. 979. Here cited from *Malone v. Metropolitan Police Commissioner*, cf. [1979] 2 All E.R. 620, at pp. 627 f.

¹⁷ *Ibid.*, at p. 628.

¹⁸ Cf. Eur. Court H.R., *Klass Case*, Series A, Vol. 23 (1974).

¹⁹ Cf. [1979] 2 All E.R. 620, at pp. 628 ff.

²⁰ *Ibid.*, at p. 648.

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require any statutory or common law power to justify it.²¹

As a treaty which had not been incorporated, the Convention was not part of *English* law, and in this particular case it could not be used as a guide to interpretation either. The reason for this was that there was really no choice between the interpretations which were consistent and inconsistent with the Convention. There was an absence of legislation, but no gap in the law. Since Parliament had abstained from legislating on this point - which was clearly suitable for legislation - the courts could not (properly) and should not try to fill the gap. The European Court subsequently held that there had been a breach of Article 8 of the Convention in the case.²²

In *R. v. Secretary of State for the Home Department, ex parte Brind*, a more recent decision concerning the freedom of speech and Article 10 of the European Convention, Lord Donaldson of Lynton M.R. reaffirmed, although in other words, the view held by *Sir Robert Megarry V.-C.*. He first noted that the "... the Convention is contained in an international treaty to which the *United Kingdom* is a party [...] the duty of the *English* courts is to decide disputes with *English* domestic law as it is, and not as it would be if full effect were given to this country's obligations under the treaty, assuming that there is any difference between the two."²³ The consequence of this was in the Master of the Roll's view

"... that in most cases the *English* courts will be wholly unconcerned with the terms of the convention. The sole exception is when the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning. In that situations various *prima facie* rules of construction have to be applied, such as that, in the absence of very clear words indicating the contrary, legislation is not retrospective or penal in effect. To these can be added, in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the *United Kingdom's* treaty obligations" (emphasis added).²⁴

11.3.2. Statutory Interpretation.

The principle of interpretative presumption is of course also applicable to the

²¹ *Ibid.*, at p. 649. Telephone tapping was, however, to some extent recognized by the Post Office Act 1969.

²² See Eur. Court H.R., *Malone Case*, Series A, Vol. 82 (1984).

²³ Cf. [1990] 1 All E.R. 469, at p. 477.

²⁴ *Ibid.*

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ECHR; it is probably of particular importance in the case of the Convention.²⁵ In a large number of decisions this principle has been used to interpret ambiguous legislation in accordance with the Convention. However, as was the case regarding treaties in general, the case-law concerning the application of the Convention is also not consistent.

The case of *Waddington v. Miah* was apparently the first reported case in which an *English* court actually relied on the Convention in the interpretation of a statute.²⁶ In this case both the *Court of Appeal* and the *House of Lords* concluded that certain words of section 34 (1) of the 1971 Immigration Act were ambiguous and that the penal legislation in question could not be retrospective, on the presumption that legislation is in accordance with treaty obligations. In support of this presumption *Stephenson L.J.* in the *Court of Appeal* and *Lord Reid* in the *House of Lords* made specific reference to Article 7 of the Convention, which expressly prohibits retrospective criminal legislation. As *Lord Reid* said, after having quoted Article 7, "... [s]o it is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation".²⁷ *Stephenson L.J.* had also referred to the fact that the two Articles had "forbidden" retrospective penal legislation.²⁸

Subsequently, in *Ram Chand Birdi v. Secretary of State for Home Affairs*, *Lord Denning M.R.* suggested, as an *obiter dictum*, that "... if an Act of Parliament did not conform to the Convention, I might be inclined to hold it invalid."²⁹ The case concerned the unsuccessful appeal to the *Court of Appeal* by an applicant who applied for a writ of *habeas corpus* on the ground that by virtue of his arrival in *England* before 1 January 1975, he was an illegal immigrant entitled to Her Majesty's pardon because of an amnesty announced by the Home Secretary in April 1974. In the end, however, the appeal was dismissed on the merits.

However, in *R. v. Secretary of State for Home Affairs, ex parte Bhajan*

²⁵ Cf. F.A. Mann, *op.cit.*, p. 87.

²⁶ See Drzemczewski (1983), p. 179. However, in *Broome v. Cassell & Co.*, cf. [1973] A.C. 1027, at p. 1133, *Lord Kilbrandon* stated that a constitutional right of freedom of speech must be recognized in *British* law at least since the date on which the Convention was ratified by the *United Kingdom*.

²⁷ Cf. [1974] 2 All E.R. 377, at p. 379 f. For an extract of the decision, see 17 Yearbook (1974), pp. 680 ff.

²⁸ Cf. [1974] 1 All E.R. 1110, at p. 1116.

²⁹ Cf. 61 International Law Reports, p. 250.

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Singh, which was delivered shortly after *Birdie*, Lord Denning M.R. moderated (or even repudiated) his earlier suggestion by describing his earlier statement as a "very tentative" one which "... went too far"; instead he restated the traditional rule that "... if an Act of Parliament contained any provision contrary to the [C]onvention, the Act of Parliament must prevail."³⁰ Previously in the judgment, the Master of Rolls had stated:

"What is the position of the Convention in our *English* law? I would not depart in the least from what I said in the recent case of *Birdie v. Secretary of State for Home Affairs*. The courts can and should take the Convention into account.

They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation would do nothing which was in conflict with treaties."³¹

In the case in question, the *Court of Appeal* rejected the argument of the applicant, an illegal immigrant, that he was entitled by virtue of Article 12 of the Convention to be released from prison so that he could marry. The right to marry was unanimously held to be subject to "... circumstances in which the parties are placed"³² and, since the applicant was lawfully detained under Article 5(1), he did not have the right to leave prison to get married. At any rate, the provisions of the Convention and their applicability to the question at issue were discussed at length. Since no conflict with the Convention was found, Lord Denning M.R.'s statements both appear to be *obiter dicta*.

In *R. v. Secretary of State for the Home Department, ex parte Phansopkar*, and *ex parte Begum* the *Court of Appeal* allowed appeals by Mrs Phansopkar and Mrs Begum, both wives of patrials - whose countries of origin were India and Bangladesh - to obtain certificates of patriality in accordance with certain sections of the 1971 Immigration Act in order that they be permitted to enter the *United Kingdom* immediately and not sent back to Bombay and Dacca.³³ In their judgments both Lord Denning M.R. and Scarman L.J. referred to Article 8 of the Convention which guarantees the

³⁰ Cf. [1975] 2 All E.R. 1081, at p. 1083. For an extract of the decision, see 18 Yearbook (1975), pp. 436 ff.

³¹ Ibid.

³² Ibid.

³³ For further information, see Lord Denning: *The Due Process of Law*, London (1980), pp. 168 ff.

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right to respect for family life, interference with this right being permitted only if made in accordance with the law and when considered to be necessary in a democratic society. In addition, *Scarman L.J.* went on to say:

"Delay of this order appears to me to infringe at least two human rights recognised, and therefore protected, by *English* law. Justice delayed is justice denied: "We will not deny or defer to any man either justice or right": Magna Carta. This hallowed principle of our law is now reinforced by the European Convention for the Protection of Human Rights 1950 to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard: see *R. v. Secretary of State for Home Affairs, ex parte Bhajan Singh* in this court [...] It may, of course happen under our law, that the basic rights to justice undeferred and to respect for family and private life have to yield to express requirements of a statute. In my judgment it is the duty of the courts, so long as they do not defy or disregard clear and unequivocal provision, to construe statutes in a manner which promotes, not endangers, those rights. Problems of ambiguity or omission, if they arise under the language of the Act should be resolved so as to give effect to, or at the very least so as not to derogate from, the rights recognised by Magna Carta and the European Convention."³⁴

It is probably fair to view these judgments as having laid the foundation for the application of the Convention as a means of interpretation in *English* law. It is interesting to observe that just after these judgments had been passed, Dr. James Crawford ended a summary of the decisions in the following way: "Those advising immigrants, and others whose human rights as enumerated in the Convention are affected by administrative action, will no doubt be alert to the possibility of pleading the Convention before *British* courts; indeed, in the cases reviewed here, it could hardly have made a difference had the Convention been implemented in terms as parts of the local law. Whether this *jurisprudence* will become *constante*, however, remains to be seen."³⁵

However, in *Reg. v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, rendered not long after the above cases, *Roskill L.J.* described the statements of *Scarman L.J.* as *obiter dicta* and as having gone too far in the passage of the *Phansopkar* judgment as well as some

³⁴ Cf. [1975] 3 All E.R. 497, at pp. 510 f.

³⁵ Cf. James Crawford: *Decisions of British Courts during 1974-75 Involving Questions of Public and Private International Law*. A. *Public International Law*, in 47 *British Yearbook of International Law* (1974-1975), p. 361.

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statements in *Pan American*.³⁶ Thus *Roskill L.J.* felt that *Scarman L.J.*'s approach might need reconsideration hereafter.³⁷ On the other hand, *Lord Denning M.R.*, while "amending" certain statements in *Bhajan Singh*,³⁸ said that

"... if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring it into harmony with it. Furthermore, when Parliament is enacting a statute, or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the Convention, and intended to make the enactment accord with the Convention; and will interpret them accordingly. But I would dispute altogether that the Convention is part of our law. Treaties and declarations do not become law until they are made public by Parliament."³⁹

Geoffrey Lane L.J. concurred with the two other members of the Court.⁴⁰

Compared to the previous cases, this decision seems to be a step backwards in taking the provisions of the Convention into account.⁴¹ Thus *Dr. James Crawford* modified his characterization of the state of case-law involving the Convention made the year before: "But for the time being at least, the *jurisprudence* of the Court of Appeal in matters involving the European Convention is by no means *constante*."⁴² This is also true regarding subsequent case-law.

³⁶ Cf. Lloyd's Rep. 257, at p. 261, where it was held: "Such a convention [the ECHR], especially a multilateral one, should then be considered by Courts even though no statute expressly or implicitly incorporates it into our law."

³⁷ Cf. [1976] 3 All E.R. 843, at p. 849.

³⁸ Ibid., at p. 847. Thus *Lord Denning M.R.* said: "I desire, however, to amend one of the statements I made in... [*Bhajan Singh*]... I said then that immigration officers ought to bear in mind the principles stated in the [C]onvention. I think that would be asking too much of the immigration officers. They cannot be expected to know the [C]onvention."

³⁹ Ibid.

⁴⁰ In *R. v. Secretary of State for the Home Department, ex parte Fernandes*, cf. the Times, 21 November 1980, both *Waller L.J.* and *Ackner L.J.* held that, in a case where an deportation order was challenged before the Court, as well as a petition had been lodged with the European Commission, the Secretary of the State (of the Home Department) in exercising his statutory powers is not obliged to take into account the provisions of the Convention which are not part of *English law*.

⁴¹ Cf. Michael Zander: *A Bill of Rights*, 3rd edition, London (1985), p. 34; and Peter Wallington and Jeremy McBride: *Civil Liberties and a Bill of Rights*, London (1976), p. 50.

⁴² Cf. James Crawford: *Decisions of British Courts during 1976-77 Involving Questions of Public and Private International Law. A. Public International Law* in 48 *British Yearbook of International Law* (1976-1977), pp. 351 ff.

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In *Ahmed v. Inner London Education Authority* a majority of the *Court of Appeal* held that the Inner London Education Authority had not violated section 30 of the 1944 Education Act by requiring the appellant, a Muslim, to become part-time teacher, if he wanted time off every Friday for prayer.⁴³ *Lord Denning M.R.* saw "... nothing in the European Convention to give Mr Ahmed any right to manifest his religion on Friday afternoons in derogation of his contract of employment..."⁴⁴ and in the judgment of *Orr L.J.* the freedom of religion guaranteed by the Convention could not "... be construed as entitling an employee to absent himself, for the purpose of religious worship, from his place of work during working hours and in breach of his contract of employment."⁴⁵ *Scarmann L.J.* did not, however, agree with the majority and, referring to "... modern *British* society, with its elaborate statutory protection of the individual from discrimination arising from race, colour, religion, sex, and against the background of the European Convention..."⁴⁶ he considered that the choice which the Inner London Education Authority had forced upon Mr Ahmed was tantamount to dismissal from full time employment.⁴⁷ Moreover, he stated that "... against the background of the European Convention, this is unacceptable, inconsistent with the policy of modern statute law and almost certainly a breach of our treaty obligations."⁴⁸ This view turned out to be wrong. In its decision on the admissibility in Application No. 8160/78, the European Commission declared the application inadmissible, quoting the limitations recognized in Article 9(2) and stating that no violation of Mr Ahmed's right to freedom of religion under Article 9(1) of the Convention had taken place.⁴⁹

Some cases either decided by courts in *Northern Ireland* or concerning events having taken place in *Northern Ireland* are of particular interest. In *R. v. Deery the Northern Ireland Court of Criminal Appeal* referred to Article 7 of the Convention in deciding that the 1969 Firearms Act (with subsequent

⁴³ [1978] 1 All E.R. 574. For a summary of the decision, see 20 Yearbook (1977), pp. 818 ff.

⁴⁴ *Ibid.*, at p. 578.

⁴⁵ *Ibid.*, at p. 581.

⁴⁶ *Ibid.*, at p. 585.

⁴⁷ *Ibid.*, at p. 586.

⁴⁸ *Ibid.*, at p. 585.

⁴⁹ Cf. 22 D.R., pp. 27 ff., at p. 38. See also John A. Andrews: *The European Jurisprudence of Human Rights*, 43 Maryland Law review (1984), pp. 463, at pp. 483 f.

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amendments) did not operate retrospectively so as to increase the penalties available for offences committed before it was made. Having referred to the *English* cases where the Convention had been used as a means of interpretation, *Lowry L.C.J.* then held that "[i]n approaching the problem which this Court has to solve, the following principles can be stated:

1. There is a presumption that a law is not retrospective;
2. This presumption does not apply to procedure (including criminal procedure), but it does apply strongly to a law creating an offence or increasing the penalty for an existing offence;
3. Regulations purporting to have a retrospective effect are *ultra vires* unless such effect is authorised by statute;
4. Treaty obligations are not part of the law unless incorporated by statute into that law and there is no rule of law invalidating an Act which conflicts with treaty obligations or compelling a construction which will avoid that result: but
5. Treaty obligations are a strong guide to the meaning of ambiguous provisions, since the Government is presumed to intend to comply with such obligations;
6. Both the presumption against retrospection and the presumption of adherence to treaty obligations may be rebutted by clear express language or by necessary implication."⁵⁰

R. v. McCormick, another case from *Northern Ireland*, is perhaps the case in which a *British* court has paid most attention to the Convention: the judge found that the statutory provision in question had in fact incorporated the Convention's text into domestic law.⁵¹ The question at issue before the *Belfast City Commission* concerned the admissibility of statements made by the accused. Section 6 of the 1973 Northern Ireland (Emergency Provisions) Act had provided that, for certain listed offences, relevant statements made by the accused were to be admissible unless "... *prima facie* evidence is adduced that the accused was subjected to torture or degrading treatment," in which case the section required evidence to be excluded "... unless the prosecution satisfies [the Court] that the statement was not so obtained." *McGonigal L.J.* considered that

⁵⁰ Here cited from the extract in 20 Yearbook (1977), p. 829.

⁵¹ Cf. P.J. Duffy, *op.cit.*, p. 589.

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"... the terms torture or inhuman or degrading conduct in section 6 [...] are taken from Article 3 [of the Convention] and Parliament in using these words was accepting as guidelines the standards laid down in the European Convention on Human Rights [...] if the use of the terms in section 6(2) are derived, as I consider them to be, from Article 3, the meaning assigned to the terms by the European Commission on Human Rights is, at the very least, of very persuasive effect, if not definitive in determining the meaning to be given to these same terms as used in section 6."⁵²

Thus this judgment contains a careful examination of the Commission's case-law on Article 3 as well as a loyal application of this case-law in domestic law. The judgment indicates presumably, on the other hand, the absolute limit of *British* courts' application of the Convention.

Gulfoyle v. Home Office concerned the question of whether or not a petition to the European Commission, though not yet declared admissible, made a prisoner "a party to any legal proceedings" within the meaning of rule 37A(1) of the Prison Rules 1964. This rule provided that, as a general principle, prisoners who were a party to any legal proceedings could correspond with their legal adviser in connection with the proceedings. All three judges found that, at least at this stage of the proceedings before the Commission, the prisoner was not "a party to any legal proceedings"⁵³. Of particular interest is that *Lord Denning M.R.* and *O'Connor L.J.* to a large extent based their argumentation, which was otherwise one of domestic law, on the fact that an examination of a prisoner's correspondence with the Commission was contemplated by Article 3(2) of the European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights of 1969.

The case in which the potential consequences for the applicant of the Court not taking the Convention into account have been the most serious, and where this was not actually done, seems so far to be *R. v. Secretary of State for the Home Department, ex parte Kirkwood*.⁵⁴ In 1982 the applicant, who was wanted in the State of California on a murder charge, was arrested in *England*. The United States Government requested his extradition. He was subsequently detained under section 10 of the Extradition Act 1971. The ap-

⁵² Here cited from the extract in 21 Yearbook (1978), pp. 789 ff., at p. 792.

⁵³ Cf. [1981], 1 All E.R. 943.

⁵⁴ [1984] 2 All E.R. 390.

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plicant made no application for a writ of *habeas corpus* but applied to the European Commission, claiming that his extradition would violate Article 3 of the Convention on the ground that, if he were convicted in California, he would be sentenced to death and the inordinance delay in carrying out the death penalty in that state would amount to inhuman and degrading treatment. The Commission indicated, under rule 36 of its Rules of Procedure, that he should not be extradited before December 1983. In accordance with practice, the Secretary of State for the Home Department took no further action while the indication applied. The Commission did not renew the indication in December but intimated that it would consider the admissibility of the application in March 1984. In February 1984 the Secretary of State issued a warrant, under section 11 of the 1870 Act, ordering the applicant to be surrendered to the United States' authorities. Before the warrant was executed, the applicant applied *ex parte* for leave to apply for judicial review of the order on the grounds that the Secretary of State should not have acted while the application to the Commission was being considered. Such leave was granted as well as that the grant of leave should operate as a stay of proceedings on the warrant until the application for judicial review was determined. The Secretary of State then applied for the stay to be discharged.

Although *Mann J.* held that the stay of proceedings in these circumstances clearly had no authorization in domestic law, he also decided to express a view on its merits. Having cited a part of *Ex parte Fernandes*, he continued, "[a]ccepting as I do that the consequences for the applicant are more serious than the consequences for Mrs Fernandes, I am quite unable to distinguish the decision in *Ex p Fernandes* on that ground. Accordingly, as it seems to me, the chances of success by way of judicial review are negligible."⁵⁵

Although the Convention has been applied as a means of interpretation to statutes on a number of occasions, this number is certainly not overwhelmingly high. "Considering how many reported cases raise points of statutory interpretation", as *P.J. Duffy* has pointed out, "the case law referring to the Convention is perhaps most conspicuous by its rarity."⁵⁶ This is true even when one compares this case-law with that of the *Scandinavian* countries, which is also relatively rare. Moreover, it should be kept in mind that the

⁵⁵ *Ibid.*, at p. 395.

⁵⁶ Cf. *P.J. Duffy*, *op.cit.*, p. 596.

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case-law is far from consistent in this area. With these two reservations the available case-law regarding the application of the principle of interpretative presumption suggests some conclusions.

If the meaning of a statutory provision is clear and unambiguous, this interpretation must be applied even if it is contrary to the Convention. If, on the other hand, the meaning of legislation is unclear or ambiguous, the principle of interpretative presumption may be used. The available case-law reflects the idea that the principle should be applied in order to avoid conflicts with the more absolute provisions of the Convention rather than advancing the Convention rights in *English* law.⁵⁷ Moreover, it follows from *Waddington v. Miah* that the principle is also applicable with regard to the Convention in cases where the legislation in question has neither expressly nor implicitly sought to incorporate it into domestic law. However, the degree to which the Convention has been used as a means of interpretation varies from case to case. This might be due to the fact that strong arguments have been put forward both for and against incorporation of the Convention into domestic law, and the differing evaluations of these arguments may explain the varying degrees of interest shown by individual judges *vis-à-vis* using the Convention in statutory interpretation.⁵⁸

The importance of the principle of interpretative presumption can be summed up as being a question of how readily judges are willing to find legislative provisions ambiguous. Thus there is ample room both for the judge who does not want to include the Convention in his reasoning as well as for the judge who does.

As in *Scandinavia*, it has been discussed whether the principle of interpretative presumption applies to statutes enacted prior to the ratification or signature of the Convention. Clearly Parliament could not at the time have had any intention of conforming to a non-existing international obligation. No case-law exists which decides the point definitively. The question arose in *Williams v. Home Office (No. 2)*.⁵⁹ When serving a prison sentence, the plaintiff had for a period of time been confined to a special control unit established as a means of containing and controlling troublemakers. After his release the plaintiff brought an action claiming damages for false imprison-

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, at p. 591.

⁵⁹ [1981] 1 All E.R. 1211. See also *Ahmad* (discussed *supra*).

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ment contending, *inter alia*, that he had been subject to "cruel and unusual punishments" contrary to the Bill of Rights 1688 and that this provision should be interpreted in accordance with Article 3 of the Convention. The defendant accepted this argument - so the problem was not raised - and *Tudor Evans J.* took the Convention into account when deciding the case, but he saw no conflict between the two provisions.⁶⁰ In the end the Court did not think that the regime had been cruel.

It could be argued that the courts should apply the interpretative presumption regardless of the age of the statute in question, as it would be quite unrealistic to expect Parliament to attempt to discover and amend all legislative ambiguities which might be contrary to a newly-acquired international obligation, especially one of such a general nature as the Convention.⁶¹ In this way, the critique of the *Scandinavian* principle of presumption in general expressed in section 2.3 seems to be valid for *English* law also.

11.3.3. Establishing that there is no Conflict between the European Convention and Domestic Law.

In some, mainly recent, cases *British* courts have stated that in the case at issue they have not found any conflict between the provisions of the Convention, as incorporated by them, and domestic law.

In *R. v. Secretary of State for Home Affairs, ex parte Hosenball*,⁶² concerning the deportation of an alien on grounds of national security without informing him about what constituted the national security risk, *Lord Denning M.R.*, by quoting a passage of the European Commission's decision in Application No. 7729/76, stated that there was no conflict between the Convention and domestic *English* law.⁶³

In *Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners*, concerning the forfeiture of some Krugerrand coins which had been attempted smuggled into the *United Kingdom* by three men who

⁶⁰ However, the *House of Lords Select Committee* on a Bill of Rights expressed doubts as to whether the Convention should be used to interpret legislation enacted before it existed, cf. *Report of the Select Committee on a Bill of Rights* (1978), p. 28.

⁶¹ *Ibid.*, at pp. 591 ff.

⁶² See also *Ex parte Bhajan Singh* (see *supra* section 11.3.2) where it was held that there was no conflict between the Convention and domestic law.

⁶³ Cf. [1977] W.L.R. 766, at p. 779. For further information, see *Lord Denning, op.cit.*, pp. 85 ff.

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had defrauded a German company of them, *Lord Denning M.R.* first cited Article 1 of the First Protocol and then held that "[i]n view of those exceptions [recognized by paragraph 2 of the Article], it is quite clear that there is nothing which impairs the right of a state to forfeit property which has been brought into the country in breach of its customs laws."⁶⁴ Moreover, the Master of Rolls confirmed, though as an *obiter dictum*, that the Convention "... is not part of our *English* law. But we do pay attention to the Convention as it stands."⁶⁵

Another interesting case is *Re K.D.* where the *House of Lords* found that a decision to the effect that a natural mother should cease to have access to her child, which was placed in a long-term foster home, conformed to the requirements set forth in Article 8 of the Convention.⁶⁶ *Lord Templeman* explained very clearly why, in his opinion, there was no divergence between the Convention and "*English* common law and statute":

"In my opinion there is no inconsistency of principle or application between the *English* rule and the [C]onvention rule. The best person to bring up a child is the natural parent [...] Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation. In terms of the *English* rule the court decides whether and to what extent the welfare of the child requires that the child shall be protected against harm caused by the parent, including harm which could be caused by the resumption of parental care after separation has broken the parental tie. In terms of the [C]onvention rule the court decides whether and to what extent the child's health or morals require protection from the parent and whether and to what extent the family life of parent and child has been supplanted by some other relationship which has become the essential family life for the child."⁶⁷

Lord Oliver of Aylmerton put much effort into establishing that domestic law, as well as the way in which it was applied in the case at issue, was in harmony with the Convention.⁶⁸ In particular he quoted from the judgment of the European Court in the *Case of R v. the United Kingdom*,⁶⁹ where the *United Kingdom* was found to have violated Article 8 of the Convention, and

⁶⁴ Cf. [1980] 1 A.C. 391, at p. 404.

⁶⁵ *Ibid.*, at p. 403.

⁶⁶ Cf. [1988] 1 All E.R. 577.

⁶⁷ *Ibid.*, at p. 578.

⁶⁸ *Ibid.*, at pp. 587 f.

⁶⁹ Cf. Eur. Court H.R., *Case of R v. the United Kingdom*, Series A, Vol. 121 (1987).

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concluded that nor this decision "contradicted" the principle deriving from the *English* case-law.

In *Hone and McCartan v. Maze Prison Board of Visitors*⁷⁰ the *House of Lords* held that there was no conflict between the Convention and domestic law. Two prisoners serving long sentences were charged with assault of prison officers. At inquiries held by the Board of Visitors the charges were found proved and the prisoners were awarded, *inter alia*, cellular confinement. Both prisoners applied for judicial review claiming that they had a right to legal representation before the Board of Visitors and that they had been denied this right.

Rule 30(2) of the Prison Rules (Northern Ireland) 1982 provided that a prisoner should be given "full opportunity [...] of presenting his own case". Lord Goff of Chieveley, speaking for a unanimous *House of Lords*, first looked to the available domestic case-law and concluded that the position in *English* law - up to then - had been that, before a board of visitors, a prisoner charged with a disciplinary offence had had no right to legal representation, but that the Board had a discretion to grant representation. He then considered Article 6(3) of the Convention and discussed the cases where the European Court of Human Rights had interpreted this Article.⁷¹ Lord Goff concluded that there were no inconsistencies between the European Court's interpretation of the expression "criminal offence" in Article 6(3) and *English* law. Consequently, "[t]he absolute right to legal representation now claimed by the appellants is not, as I understand the position, required by the [C]onvention any more than it is required by *English* law."⁷²

There seems to be a rising tendency in the *British* case-law to establish, after having discussed, the interpretation of the Convention, that no conflict exist between the Convention and domestic law. In this way the courts, like their *Scandinavian* counterparts, avoid stating explicitly that domestic law is in conflict with the Convention, and that the former has to prevail, thus encouraging applicants to file applications with the European Commission.

11.3.4. The Position of the European Convention in Relation to the Exercise

⁷⁰ [1988] 1 All E.R. 321.

⁷¹ Cf. Eur. Court H.R., *Case of Engels and Others*, Series A, Vol. 22 (1976); and *Case of Campell and Fell*, Series A, Vol. 80 (1984).

⁷² Cf. [1988] 1 All E.R. 321, at p. 329.

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of Discretionary Powers by Administrative Authorities.

Some of the decisions discussed above have touched upon whether or not administrative authorities are allowed or are even under a legal obligation to exercise their discretionary powers in accordance with the requirements of the Convention. When a power vested in a public authority is exceeded, acts done *in excess* of the power are under *English* law invalid as being *ultra vires*.⁷³ Moreover, the courts may intervene to prevent powers being abused.⁷⁴ Hence the question is whether the Convention constitutes any limits which administrative authorities cannot exceed.

Some case-law exists on this point but virtually only in the context of the immigration rules and deportation. In *Ex parte Bhajan Singh*, Lord Denning M.R. held, *inter alia*, that "... the immigration officers and the Secretary of State in exercising their duties ought to bear in mind the principles stated in the Convention. They ought consciously or unconsciously to have regard to the principles in it - because, after all, the principles stated in the Convention are only a statement of the principles of fair dealing; and it is their duty to act fairly."⁷⁵ However, in *Ex parte Bibi* the Master of the Rolls modified or, in his own words, "amended" this statement by saying that the immigration officers "... cannot be expected to know or to apply the Convention. They must go simply by the immigration rules laid down by the Secretary of State and not by the Convention."⁷⁶ This line was followed in the subsequent judgments in *Ex parte Hosenball*, *Ex parte Fernandes* and *Ex parte Kirkwood* (see *supra* section 11.3.2) with even more emphasis on that the Secretary of State was under no obligation to take the Convention into account in the exercise of his discretionary powers.

Dr. F.A. Mann has summarized the legal position in this respect in the following way:

"In short, while the unincorporated treaty cannot be the sole or decisive basis for the Executive's decision, it should be allowed to reinforce a decision founded on other grounds. To put it negatively, arguments derived from the treaty should not be excluded on the ground of absence of incorporation, for the treaty imposes an international obligation which, within the limits of prevailing *English* law, should be fulfilled. This may be a difficult path to follow, but the difficulty is created, not by the law, but by the Executive's failure to adopt the route prescribed by a basic

⁷³ See, for instance, E.C.S. Wade & A.W. Bradley, *op.cit.*, pp. 628 f.

⁷⁴ *Ibid.*, at pp. 630 ff.

⁷⁵ Cf. [1975] 2 All E.R. 1081, at p. 1083.

220⁶ Cf. [1976] 3 All E.R. 843, at p. 847.

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principle of constitutional law.⁷⁷

How well-founded this view may be *de sententia ferenda*, it seems not to have been accepted in practice. In *Ex parte Brind* (see *supra* section 11.3.1), after having accepted the principle of interpretative presumption for statutes, *Lord Donaldson of Lymington M.R.* held:

"Thus far I have referred only to primary legislation, but it is also necessary to consider subordinate legislation and executive action, whether it be the authority of primary or secondary legislation. Counsel for the applicants submits that, where there is any ambiguity in primary legislation and it may accordingly be appropriate to consider the terms of the convention, the ambiguity may sometimes be resolved by imputing an intention to Parliament that the delegated power to legislate or, as the case may be, the authority to take executive action, shall be subject to the limitation that it be consistent with the terms of the Convention. This I *unhesitatingly and unreservedly reject*, because it involves imputing to parliament an intention to import the convention into domestic law by the back door, when it has quite clear refrained from doing so by the front door" (emphasis added).⁷⁸

As regards the case at issue, the master of the rolls did not find any ambiguity in the provisions concerned. "It follows that whilst the Home Secretary, in deciding whether or not to issue a directive and the terms of that directive, is free to take account of the terms of the convention, as at some stage he undoubtedly did, he was under no obligation to do so. It follows that the terms of the convention are quite irrelevant to our decision and that the *Divisional Court* erred in considering them, even though in the end it concluded that it derived no assistance from this decision."⁷⁹

11.3.5. The European Convention as Part of Common Law.

It has been discussed whether the Convention could be said to be part of *English* law as part of common law. *P.J. Duffy* lists three ways in which this could possibly happen.⁸⁰

As already mentioned, customary international law is part of the common law without the need to incorporate legislation. Although treaties do not normally constitute customary international law, it is to some extent accepted

⁷⁷ Cf. F.A. Mann, *op.cit.*, p. 96. For a similar view, see P.J. Duffy, *op.cit.*, pp. 598 f.

⁷⁸ Cf. [1990] 1 All E.R. 469, at pp. 477 f.

⁷⁹ *Ibid.*, at p. 478.

⁸⁰ Cf. P.J. Duffy, *op.cit.*, pp. 599 ff.

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that they do so when there are evidence of a general practice as law.⁸¹ Hence the problem in this connection is to what extent the Convention can be said to represent *customary international law*, i.e. to exist independently of the Convention itself as an obligation of international law.

Since the Convention was not made as a codification of existing rules of international law, there is clearly a presumption against this theory which is not supported by the available case-law.⁸² Although agreeing that a few provisions of the Convention, in particular Article 3 prohibiting torture and inhuman or degrading treatment, may be said to represent customary international law, *P.J. Duffy* concludes that it is very unlikely that such a theory will be accepted by the courts.⁸³

The second possibility, and so far the one with the best prospect of being accepted by the courts, for the Convention to enter common law is as a *public policy*.⁸⁴ The contents of public policy vary over the years, and the question is therefore whether the standards of the Convention have now acquired this status. The *House of Lords* had an opportunity to rule on this question in *Blathwayt v. Lord Cawley* concerning religious discrimination. *Lord Vilberforce* stated on that occasion, referring to the Convention:

"It was said that the law of *England* was not set against discrimination on a number of grounds including religious grounds and appeal was made to... [*inter alia*]... the European Convention of Human Rights of 1950, which refers to freedom of religion and to enjoyment of that freedom without discrimination on grounds of religion. My Lords, I do not doubt that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move."⁸⁵

Thus, the *House of Lords* seems at least in principle to accept the possibility, but the claim in this case failed on the merits and for this reason does not provide an example of the application of this principle.

⁸¹ See, for instance, Article 38(1)(6) of the Statute of the International Court of Justice.

⁸² No such case concerning the Convention appears to exist.

⁸³ Cf. *P.J. Duffy*, op.cit., pp. 604 f. For a different view, see Andrew Drzemczewski: *The application of Customary International Human Rights in the English Legal System*, 1975 *Human Rights Journal*, pp. 71 ff.

⁸⁴ For a general account of public policy in relation to foreign affairs in *English* courts, see *F.A. Mann*, op.cit., pp. 148 ff.

⁸⁵ [1975] 3 All E.R. 625, at p. 636.

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In *R. v. Lemon & Gay News Ltd.*, in which the *House of Lords* reaffirmed the conviction of the appellants for publishing a blasphemous libel, it is of interest to note that *Lord Scarman* referred to Articles 9 and 10 of the Convention in order to justify the Court's reasoning according to which the character of the words published and not the motive of the author or publisher was considered to be the necessary ingredient to secure a conviction.⁸⁶ *Lord Diplock*, on the other hand, considered that by rejecting the so-called *subjective test* of the accused's intention, blasphemous libel would revert to the exceptional category of crimes of strict liability, and that such a retrograde step could not be justified by any considerations of public policy.⁸⁷

In *Gleaves v. Deakin & Others*, rendered only a few months later, *Lord Diplock* considered the Convention to be of undoubted authority. In this case a private citizen instigated a prosecution alleging that the criminal offence of defamatory libel had been committed against him. The defendants claimed that they should have been able to provide evidence of the generally bad reputation of the prosecutor before the *magistrate at committal proceedings*, although their appeal on this point failed both before the *Court of Appeal* and the *House of Lords*. In expressing his concern about the unsatisfactory state of affairs in the *English* legal system, *Lord Diplock* was of the opinion that the criminal offence of defamatory libel retained anomalies involving serious departure from accepted principles upon which the modern criminal law of *England* is based and which was also difficult to reconcile with the *United Kingdom's* international obligations under the Convention. He explained that

"... under art. 10(2) of the European Convention, the exercise of the right of freedom of expression may be subjected to restrictions or penalties by a contracting state, only to the extent that those restrictions or penalties are necessary in a democratic society for the protection of what (apart from the reputation of individuals and the protection of information received in confidence) may generally be described as the public interest. In contrast to this truth of defamatory statement is not in itself a defence to a charge of defamatory libel under our criminal law; so here is a restriction on the freedom to impart information which states that are parties to the Convention have expressly undertaken to secure to everyone within their jurisdiction. No onus lies on the prosecution to show that the defamatory matter was of a kind that is necessary in a democratic society to suppress or penalise in order to protect the public interest. On the contrary, even though no public interest can be shown to be injuriously affected by imparting to others accurate information about seriously

⁸⁶ Cf. [1979] 1 All E.R. 898, at p. 927.

⁸⁷ *Ibid.*, at p. 905.

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descreditable conduct of an individual, the publisher of the information must be convicted unless he himself can prove to the satisfaction of a jury that the publication of it was for the public benefit. *This is to turn art. 10 of the Convention on its head.* Under our criminal law a person's freedom of expression, wherever it involves exposing seriously discreditable conduct of others is to be repressed by public authority unless he can convince a jury *ex post facto* that the particular exercise of the freedom was for the public benefit, whereas art. 10 requires that freedom of expression shall be untrammelled by public authority except where its interference to repress a particular exercise of the freedom of expression is necessary for the protection of the public interest" (emphasis added).⁸⁸

Lord Diplock then went on to suggest that in order to "avoid the risk of our failing to comply with our international obligations under the European Convention" the consent of the Attorney-General should be required before a prosecution for criminal libel is instituted, and that in deciding whether to grant his consent in a specific instance "... the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specified in Article 10(2) of the Convention and unless satisfied that it was, he should refuse his consent."⁸⁹

In the more recent *Cheall v. APEX* it was submitted that there exists a rule of public policy according to which the individual has the right to join and *remain* a member of a trade union of his choice, and that the unions themselves were not entitled, as was the situation in the case at issue, to put restrictions on this right. This rule, it was claimed, had now been reinforced by the accession of the *United Kingdom* to the Convention. In the *House of Lords*, *Lord Diplock*, after having quoted Article 11 of the Convention, stated as a general principle that "... freedom of association can only be mutual; there can be no right of an individual to associate with other individuals who are not willing to associate with him."⁹⁰ As regards the alleged rule of public policy, *Lord Diplock* expressed himself very clearly:

"But I know of no existing rule of public policy that would prevent trade unions from entering into arrangements with one another which they consider to be in the interest of their members in promoting order in industrial relations and enhancing their member's bargaining power with their employers; nor do I think a permissible exercise of your Lordships' judicial power to create a new rule of public policy to

⁸⁸ Cf. [1979] 2 All E.R. 497, at pp. 498 f.

⁸⁹ Ibid.

⁹⁰ Cf. [1983] 1 All E.R. 1130, at p. 1136.

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that effect. If this is to be done at all it must be done by Parliament."⁹¹

In order to implicitly distinguish this case from the situation in the *British Rail Case* before the European Court,⁹² Lord Diplock held that "[d]ifferent considerations might apply if the effect of Cheall's expulsion from APEX were to have put his job in jeopardy."⁹³

In conclusion it can be said that the public policy argument seems to carry some weight. Nevertheless, one should probably be careful of not overstating the significance of this argument: public policy does not in general and without any reservations require compliance with the standards embodied in the Convention.

The third possibility of viewing the Convention as a part of the common law mentioned by P.J. Duffy⁹⁴ is when *no clear precedent exists*. According to this view the Convention should be used to resolve ambiguous precedents or fill lacunae in the common law *to the extent* that the Convention constitutes customary international law. However, as has already been seen, it raises in itself great difficulties to argue that the Convention represents customary international law, as well as the Convention in no reported case has been used as such. On the other hand, the courts do not seem to have clearly ruled out the possibility of using the Convention to resolve ambiguous precedents and fill lacunae in common law.

However, the *Malone* case contains statements illustrating that this is probably not a practicable path for introducing the Convention as a part of common law. In the case it was argued quite strongly that the Convention, as interpreted in the *Klass Case*, should be used by the Court when deciding whether the challenged practice was legal. (The facts of the case are outlined above in section 11.2.1). *Sir Robert Megarry V.-C.* rejected these arguments stating, *inter alia*:

"I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the [C]onvention, the court would readily seek to construe the legislation in a way that would effectuate the [C]onvention rather than frustrate it. However, no relevant legislation of that sort

⁹¹ Ibid.

⁹² Cf. Eur. Court H.R., *Case of Young, James and Webster*, Series A, Vol. 44 (1981).

⁹³ Cf. [1983] 1 All E.R. 1130, at p. 1136.

⁹⁴ Cf. P.J. Duffy, *op.cit.*, pp. 607 ff.

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is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed [...]

It appears to me that to decide this case in the way that counsel for the plaintiff seeks would carry me far beyond any possible function of the [C]onvention as influencing *English* law that has ever been suggested; and it would be most undesirable. Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the [C]onvention nor the *Klass* case can, I think, play any proper part in deciding the issue before me."⁹⁵

⁹⁵ Cf. [1979] 2 All E.R. 620, at pp. 647 ff.

CHAPTER 12

The Application of the European Convention in a "Dualist" System into which it has been incorporated: Italy

12.1. Introduction.

Italy was one of the original signatories of the European Convention on 4 November 1950. In accordance with Article 80 of the *Italian* Constitution (see *infra* section 12.2), the Government obtained consent from Parliament in the form of an ordinary law (Act No. 848 of 4 August 1955) before the Convention was ratified on 26 October 1955. Declarations on the recognition of the compulsory jurisdiction of the European Court of Human Rights and the acceptance of the right of individual petition were made, effective from 1 August 1973.¹ *Italy* has made no reservations to the Convention.

Apart from embodying the consent of Parliament to the ratification of the Convention, Law No. 848 of 4 August 1955 was also a legislative act of incorporation [*ordine di esecuzione*] which ordered the execution of the Convention into domestic *Italian* law. Section 2 of this act stipulates: "Full and entire execution shall be given to the treaty".² Thus the Convention was *adopted* into domestic law by means of mere references to the provisions of the Convention. A copy of the French text of the Convention and the First Protocol followed the Act.

Accordingly, the Convention possesses the status of domestic law in *Italy*.

12.2. The Effect of Treaties in Domestic Law.

12.2.1. General Principles.

The *Italian* Constitution contains no express provision as to the effect of treaties on domestic law. The general legal principles governing this question are, like in the *Scandinavian* countries, quite clear. The following provisions touch upon the relationship between internal *Italian* law and international law

¹ For further information, see Vincenzo Starace: *Italian Acceptance of the Optional Clauses of the European Convention on Human Rights*, 1 IYIL (1975), pp. 42 ff.

² Here cited in English from Drzemczewski (1983), p. 146 note 14.

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generally:

"Article 10(1). *Italy's* legal system conforms with the generally recognized principles of international law.

Article 11. *Italy* condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between Nations: it promotes and encourages international organizations having such ends in view.

Article 80. The Chambers authorize, by law, ratification of international treaties of a political nature, or which provide for arbitration or judicial regulation, or imply modifications to the nation's territory or financial burdens or to laws.

Article 87(1). The President of the Republic is the Head of the State and represents the unity of the Nation.

[...]

(8) He [...] ratifies treaties, provided they be authorized by the Parliament whenever such authorization is necessary."³

Article 10(1) provides for an automatic incorporation of "generally recognized principles of international law" in the sense that internal legislation which conflicts with these principles of international law is considered to be unconstitutional and subject to the review of the *Corte Costituzionale* [Constitutional Court].⁴ It follows, however, from the wording of Article 10(1) that this provision confines itself to the field of customary international law and thus does not cover treaties. This is confirmed by the fact that a few provisions in the Constitution, which would otherwise have been superfluous, refer specifically to treaties.⁵ Moreover, the *travaux préparatoires* suggest that treaties are not included among the norms which are incorporated into *Italian* law by virtue of Article 10(1); this would, as Professor *Antonio Cassese* has put it, "... in the first place be contrary to the clear intent of the

³ Cf. Blaustein & Flanz, *Binder VIII*, October 1990, pp. 49, 66 and 68.

⁴ For a further elaboration on this point, see Antonio La Pergola & Patrick Del Duca: *Community Law, International Law and the Italian Constitution*, 79 *American Journal of International Law* (1985), pp. 598 ff., at pp. 602 ff.

⁵ See, for instance, Articles 7(2), 10(2) and 35(3) of the Constitution.

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Constituent Assembly."⁶⁷ This is also the opinion held by the majority of Italian legal scholars.⁸

The *Corte Costituzionale* has held the same view on a number of occasions. The first instance appears to be decision No. 32/1960, *Regione Trentino-Alto Adige v. Presidente del Consiglio dei ministri*. In this decision the *Corte Costituzionale* rejected the contention that a legislative act concerning the use of the German language in the Province of Bolzano was unconstitutional because it had allegedly been made in violation of a treaty between Austria and Italy. The Court held:

"With regard to Article 10 of the Constitution it must be noted that this provision refers to generally recognized rules of international law and not to specific commitments undertaken by the State on the international level: this clearly appears from the text of Article 10 and may also be drawn from the preparatory works."⁹

In the more recent decision No. 188/1980, *re Lintrami*, when dealing with a question of constitutionality which had been raised with reference to the ECHR and the UN-Covenant, the *Corte Costituzionale* confirmed its previous case-law according to which treaty provisions are not considered to be covered by Article 10 of the Constitution (see *infra* section 12.3).

In decision No. 144/1970, *re Farri*, the *Corte Costituzionale* rejected a question of constitutionality that had been raised with regard to Articles 2, 3 and 10 of the Constitution and some provisions of the ECHR simply by saying that under the circumstances there was no need for a detailed analysis "... either of the provisions of the Constitution or of those of the European Convention", nor was it necessary to examine "... the strength of resistance which the latter are alleged to possess."¹⁰ It has been asserted that this decision might indicate that the Court was willing to reach another conclusion regarding the ECHR. Nothing suggests, however, that this was the case.

⁶ Cf. Antonio Cassese: *Lo stato e la comunità internazionale*, in Giuseppe Branca (ed.): *Commentario della costituzione*, Bologna/Roma (1975), pp. 461 ff., at p. 493.

⁷ [In primo luogo, essa contrasta con il chiaro intento del costituente.]

⁸ For a recent survey, see Roberto Bin: *Art. 10, co. 1°* in Vezio Crisafulli & Livio Paladin (eds.): *Commentario breve alla costituzione*, Padova (1990), pp. 59 ff.

⁹ Cf. 43 *Rivista di Diritto internazionale* (1960), pp. 519 ff., at p. 522. Here cited in English from Giorgio Gaja: *Italy* in Jacobs & Roberts (1987), pp. 87 ff., at p. 89.

¹⁰ Cf. 55 *Rivista di Diritto internazionale* (1972), pp. 279 ff., at p. 280. Here cited in English from Giorgio Gaja, *op.cit.*, p. 89 note 9.

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What the Court did in this case was simply to rule that in its opinion there was no conflict between the Convention and domestic law. Moreover, in both previous and subsequent decisions the Court has confirmed that Article 10(1) is only applicable to international customary law.¹¹

Against this background it may be concluded that treaties - including the ECHR - are not covered by Article 10(1) of the *Italian* Constitution. Accordingly, only to the extent to which the Convention embodies "generally recognized principles of international law", is it automatically incorporated into domestic *Italian* law by virtue of Article 10(1).¹² However, *Italian* courts also have implicitly rejected the idea that the Convention is the expression of generally recognized principles of international law. For instance, in decision No. 69/1976, *Zennaro*, the *Corte Costituzionale* held that the principle *ne bis in idem*, embodied in Article 14(7) of the UN-Covenant but not in the ECHR, could not "... be considered, with regard to foreign judgments, as a general principle of law traceable to the category of generally recognized norms of international law which automatically become part of the law of the land within the meaning of Art. 10 ... [of the Constitution]..."¹³ This was in the Court's view "... borne out by the fact that only recently has this principle formed the object of international agreements, and that its affirmation even on the conventional plane has so far met with manifold difficulties, even in its limited application to judgments in criminal matters..."¹⁴

Hence the question is which rules do then govern the relationship between treaties and domestic *Italian* law.

On the basis of the *Corte Costituzionale*'s decision No. 170/1984, *S.p.A. Granital v. Amministrazione finanziaria*,¹⁵ it has been asserted that it "... [m]ight even be argued that treaties in general should be accorded superiority over subsequent national law and that this superiority should be enforced through decentralized review

¹¹ See decisions Nos. 68/1961, 135/1963, 48/1967, 104/1969, 69/1976, 48/1979, 96/1982 and 153/1987.

¹² Cf. Drzemczewski (1983), p. 153.

¹³ Cf. 59 *Rivista di Diritto internazionale* (1976), pp. 584 ff., at p. 587. Here cited in English from 3 *IYIL* (1977), p. 301.

¹⁴ *Ibid.*

¹⁵ Cf. 29 *Giurisprudenza costituzionale* (1984), pp. 1098 ff. An English translation of paragraphs 2-8 of the decision with an annotation by Giorgio Gaja can be found in 21 *Common Market Law Review* (1984), pp. 756 ff.

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by ordinary judges rather than by centralized constitutional review."¹⁶

This case concerned the application of Article 11 of the Constitution in relation to Community law and marked the temporary end of the longstanding controversy between the Court of Justice and the *Italian Corte Costituzionale*. Briefly speaking, the case involved a conflict between *Italian* law, which provided that certain import duties were not retroactively applicable, and Community law, which provided that they were. The Court concluded that Community law ought to apply in preference to both prior and subsequent conflicting laws without the need - and this is the real novelty of the decision - for resort to constitutional review. Consequently, specific questions concerning the applicability of Community law are in principle no longer referable to the *Corte Costituzionale*. However, the *Corte Costituzionale* reserved the right to review the conformity of Community law with the fundamental rights of the Constitution, as well as of those laws which prejudice the observance of the Treaty when the system itself or its basic principles are involved.

It seems somewhat doubtful, on the basis of this decision, which strictly concerns Community law, that it is possible to extend the principle of giving treaties superiority over subsequently enacted legislation, or to enforce decentralized review of other areas of international law in general and of treaties in particular. Article 11 does not concern treaties in general, nor does the Court's reasoning involve any considerations as to treaties in general. Moreover, legal practice does not seem to reflect any such development (see *infra* section 12.3). Therefore, it may be concluded that no further consequences for treaties in general can be drawn from *S.p.A. Granital v. Amministrazione finanziaria*.

No other provision in the *Italian* Constitution regulates the effects of treaties on domestic law. However, like the *Scandinavian* constitutional provisions governing the treaty-making power, Article 80 of the *Italian* Constitution implicitly makes a distinction between, on the one hand, the conclusion of treaties and, on the other, the incorporation of treaties into domestic law. Thus one might argue that this suggests that under *Italian* law the provisions of a treaty are not, generally speaking, directly enforceable by domestic law-enforcing authorities without an *ordine di esecuzione*. Consequently, any treaty provision which is to have domestic legislative effects must be incorporated into domestic law by a domestic legal act, as was the case with the European Convention. This is also the position held by most *Italian* legal scholars, albeit on slightly different grounds. The main reason for reaching this conclusion seems to be an (implied) *in contrario* deduction from Article 10(1).

¹⁶ Cf. Antonio La Pergola and Patrick Del Duca, *op.cit.*, p. 621. For a similar view, though on the basis of the Constitutional Court's decision No. 183/1975, *Frontini v. Ministro delle Finanze*, reported in *Giurisprudenza costituzionale* 1973, pp. 2401 ff, see Drzemczewski (1983), p. 153, who suggests that the said decision "... indicates that *Italian* courts may in certain circumstances give treaty provisions a hierarchially superior status to statute law..."

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This approach was explained very clearly by the *Corte Suprema di Cassazione* [Supreme Court of Cassation] in judgment No. 867/1972, *Unione Manifatture v. Ministero delle Finanze*, concerning a commercial treaty between *Italy* and *Syria* which had not been incorporated into domestic law:

"[A]s regards specific rules of international law, that is to say, international rules contained in international conventions, the reception into our system is carried out by means of implementation ("Ordine di esecuzione") which must emanate from a law if the area in question is reserved to legislation by the internal constitutional system. It is not therefore sufficient that those bodies competent to represent the State in international affairs should express the consent to implement the international convention since this would modify the internal system."¹⁷

In relation to the above-mentioned attempts in legal writings to reach another conclusion on the relationship between international treaties and domestic law, the Court commented on these views in the following way:

"In truth, there have been some doctrinal attempts aimed at accepting automatic reception in all cases and even in so far as concerns treaties, but this has been an isolated trend clearly in contrast with our internal system, as has been also held by the *Corte Costituzionale* (see decisions of 18 May 1960 No. 32; 22 December 1961 No. 68."

Accordingly, it is firm legislative practice to *adopt* international treaties into domestic law by means of an execution (or implementation) order [*ordine di esecuzione*], that is, stating in a statute, or subordinate legislative act depending on whether or not the consent of Parliament is required under Article 80 of the Constitution, or whether existing legislation needs to be modified, that the provisions of the treaty, or part of it, shall be *adopted* into domestic law from the date on which it enters into force for *Italy*.¹⁸

As was the case with the ECHR, it happens quite often that such an execution order is embodied in the same act as the one which authorizes the President of the Republic to ratify the treaty and is, for obvious reasons, enacted before the ratification of the treaty. It is rare that treaties are incorporated into domestic law by being *reformulated* (or *transformed*) into

¹⁷ Here cited in English from 1 IYIL (1975), p. 288. See also the *Corte Suprema di Cassazione's* decisions Nos. 1196/1972 and 1773/1972.

¹⁸ On the terminology regarding the incorporation of treaties, see *supra* section 2.1.

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a domestic legislative act.¹⁹

In cases where the treaty is *adopted* into domestic law and to the extent specified in the domestic legal instrument, the provisions of the treaty are directly applicable under domestic law. This direct applicability is, however, conditional upon the existence of the domestic provision adopting the treaty into internal law. Formally speaking, the courts apply this provision but, judged on the basis of the language used in judicial decisions, nothing suggests that this formal application of domestic law reflects the way in which the courts actually apply treaty provisions. The courts simply seem to consider the execution order as a condition for applying the treaty provisions and not, as Professor *Giorgio Gaja* has put it, "... as a legislative act that implies the formation of a series of unwritten norms to be ascertained through a comparative analysis of previously existing legislation and of treaty provisions."²⁰

Since treaties are normally adopted into domestic *Italian* law by an ordinary statute, they hold the same rank within the domestic norm-hierarchy as ordinary legislation. The same is the case with reformulated treaties. This means that statutes which conflict with adopted treaties are not *per se* considered unconstitutional as was the case with customary international law. Thus in the *re Limtrami Case* the *Corte Costituzionale* held:

"The Court shares the opinion, prevailing among writers and in judicial decisions, that - in the absence of a specific constitutional provision - treaty provisions implemented in *Italy* have the same force as ordinary statutes. Therefore, the very possibility of raising, under this aspect, a question of constitutionality is barred, even more so when... treaty provisions are invoked as tests for the constitutionality of statutory provisions."

This means that, according to the *Corte Costituzionale*, a statute may be defined as unconstitutional only if it conflicts with a treaty coming under the special categories referred to in specific constitutional provisions such as Article 10(2) providing a special safeguard for treaties concerning the treatment of aliens, Article 35(3) for treaties protecting labour and by Article 7(2) for agreements between *Italy* and the Holy See. Accordingly, it could be argued that the ECHR takes precedence over conflicting legislation insofar

¹⁹ Cf. *Giorgio Gaja*, op.cit., p. 90.

²⁰ *Ibid.*

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as it affects the treatment of aliens.²¹

If and when a conflict arises between the incorporated provisions of a treaty and subsequent legislation, the well-established rule of *lex posterior derogat legi priori* would appear to apply, thus giving priority to the domestic rule. If the conflict is instead one between a treaty and previous legislation the treaty will, according to the same principle, take precedence. It is within the competence of the ordinary courts to ascertain whether there is a conflict between an incorporated treaty and domestic (subsequently passed) legislation, as well as to resolve such a conflict.

12.2.2. Specific Principles of Interpretation.

In order to avoid any breach of international treaties, the *Italian* courts have generally endeavoured to rule out that subsequent legislation affect the application of previously implemented treaties. Two methods have generally been used to this effect:

(1) Most frequently, legislation incorporating treaties or the treaties themselves are defined as special provisions in order to consider them as remaining in force in spite of the enactment of subsequent statutes, which are regarded as containing provisions of a more general character. This notion is very similar, if not identical, with the *lex specialis principle* widely applied in *Scandinavia* (see *supra* section 10.2). The special element is provided by the fact that treaties are adopted through an execution order. The fact that treaties are usually incorporated in this way makes it difficult to ascertain what courts really have in mind when they define a treaty or its incorporating statute as special in this context. However, in the absence of any elaboration in judicial decisions with regard to the special character of execution orders, it seems reasonable to conclude that courts intend to refer, as in other cases when speciality is invoked in defining the relations between statutes, to the fact that special provisions cover a more limited subject-matter. This criterion is far from precise. In fact, it happens only infrequently in practice that the courts are faced with a so-called total-partial inconsistency to which the *lex specialis principle* is, from a logical point of view, applicable.²² As the following examples show, the inconsistency is usually one of a partial-partial character where the *lex specialis principle* does not provide any guidance as

²¹ See Antonio Cassese, *op.cit.*, pp. 520 f.

²² Cf. Ross (1958), pp. 128 ff.

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to the resolving of the conflict between adopted treaty and a subsequent enacted statute - other than supplying the legitimation for a solution based on other considerations.

As an example of the application of this principle could be mentioned decision No. 5274/1979, *Bianco v. Soc. Andreas Kufferath KG and others*, in which the *Corte Suprema di Cassazione* stated that

"... the provisions of the international conventions regarding matters regulated by domestic law rules take precedence over the latter because of their special character, independently of whether they came into existence before or after."²³

A more recent example of the use of the *lex specialis principle* is decision No. 2643/1984, *Comesar S.p.A. v. Carniti & C. S.p.A.*, in which the *Corte Suprema di Cassazione* held that Article 4(5) of the 1924 Brussels Convention on Bills of Lading "... does not find a limit to its validity and its effects in the Italian legal system, in which the said Convention was adopted as special law."²⁴

(2) In Italian law there exists also a *principle of presumption*. According to this principle the courts interpret apparently conflicting statutes subsequently enacted in a way that is consistent with treaty obligations. For instance, in decision No. 699 of 1980, *Ministero delle finanze v. Michelin Italiana S.p.A.*, the *Corte Suprema di Cassazione* denied that a subsequent statute could be interpreted as derogating from the statute incorporating the GATT:

"In the present case, such intention to derogate would involve also the intention [...] to violate the international agreement which was implemented almost simultaneously in the municipal legal order. It is necessary, therefore, also to account for the derogation from the principle according to which there is to be presumed the intention to conform with the rule of international law which requires the observance of international treaties and conventions. The intention to the contrary must be based on sound reasoning and valid arguments [...] It is clear that the only criterion which can resolve these doubts arising from a reading of the rule is exactly that of the presumption of conformity to the nonabrogated (in the relevant part) international

²³ Cf. 16 *Rivista di Diritto internazionale privato e processuale* (1980), pp. 82 ff., at p. 88. Here cited in English from 5 *IYIL* (1980-81), p. 266.

²⁴ Cf. 137 *Giurisprudenza Italiana* I, 1, pp. 183 ff., at p. 186 f. Here cited in English from Giorgio Gaja, *op.cit.*, p. 100.

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convention just a few days after its implementation."²⁵

When trying to reconcile statutes with the requirements of treaties, the courts do not seem to look for the Legislature's actual intentions since, on the contrary, it is implied in the principle itself that the Legislature was not aware of the potential conflict.²⁶ This may be illustrated by the following statement contained in decision No. 3616/1976, *Ministero delle finanze v. Società Compagnia di navigazione Marsud*, where the *Corte Suprema di Cassazione* held:

"Use must [...] be made of the principle of interpretation which requires that, failing written provision to the contrary, the State must, when enacting a provision, be presumed to have intended to honour rather than to breach international commitments. The fact that, as the preparatory work on the provision makes clear, the Legislature (wrongly) considered the introduction of the new charge to be compatible with the agreement and on that account intended it to apply to the GATT-originated goods as well, is in no sense a conclusive reason for the adoption of an interpretation consonant with that intent."²⁷

Compared to the *Scandinavian* principle of presumption which applies both in relation to unincorporated and incorporated treaties, the *Italian* principle seems to have a less wide range: it is only applicable to conflicts between adopted treaties and subsequent legislation. However, if the principle purports to avoid the breach of international obligations arising under a treaty, its application should not depend on the existence of a statute or other legislative act incorporating the treaty.²⁸

The *Corte Suprema di Cassazione*'s judgment No. 5274/1979, *Bianco v. Istituto Nazionale della Previdenza Sociale and Istituto Nazionale per l'Assicurazione contro le malattie*, can be mentioned as an example of a case in which both the *lex specialis principle* and *principle of presumption* were applied in the same decision. The Court held in this case:

²⁵ Cf. 35 *Foro Padano* (1980), pp. 37 ff., at p. 48 ff. Here cited in English from 5 *IYIL* (1980-81), pp. 267 f.

²⁶ Giorgio Gaja, *op.cit.*, p. 100, talks about "an unwritten principle governing the interpretation of statutes" which the courts apply in these cases. What is meant by this reference to an "unwritten principle" remains, however, unclear.

²⁷ Cf. 100 *Foro Italiano I* (1977), pp. 1243 ff., at p. 1248. Here cited in English from 3 *IYIL* (1977), p. 364.

²⁸ Cf. Giorgio Gaja, *op.cit.*, p. 101.

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"Not without, after all, considering that, even if as mere hypothesis, one wanted to accept the possibility of this argument, the provisions of the international conventions regarding matters regulated by domestic law rules take precedence over the latter *because of their special character*, independently of whether they came into existence before or after [...] Besides, since in case of uncertainty or ambiguity, the interpreter must follow the *criterion that the State meant to conform to its binding international commitment*, in order not to incur the relative responsibility for material breach *vis-à-vis* the other States parties to the convention which envisages such commitment, we must as a principle exclude, in the absence of an ambiguous legislative provision to the contrary, that the abrogating effect of the legal rules contained in a duly ratified convention be attributed to an ordinary law..." (emphasis added).²⁹

12.2.3. The Review of the Constitutionality of Statutes Incorporating Treaties into Domestic Law.

Statutes incorporating treaties into domestic law are, like other ordinary statutes, subject to constitutionality review by the *Corte Costituzionale* on the basis of a reference by an ordinary court.³⁰ Under Article 134 of the Constitution only statutes and legislative acts of the same level come under the *Corte Costituzionale*'s jurisdiction. Accordingly, the *Corte Costituzionale* has ruled that the constitutionality of treaties may be reviewed only indirectly, *i.e.* through the challenge of statutes implementing them. As the Court specified in decision No. 132/1985, *Coccia v. Turkish Airways*: "... The Court's ruling exclusively concerns the statutory provisions that have implemented in *Italy* the treaty provisions under review."³¹

There is a fairly clear practice that, while declaring that questions of constitutionality of statutes incorporating treaties are admissible, the *Corte Costituzionale* has taken the attitude of undervaluing conflicts between treaties and the Constitution. One example of this practice is decision No. 109/1971, *Giacomazzo v. INPS*, which summarily rejected the idea of a conflict between a treaty with Libya and the constitutional provisions

²⁹ Cf. 16 *Rivista di Diritto Internazionale Privato e Processuale* (1980), pp. 82 ff. Here cited in English from 5 *IYIL* (1980-81), p. 266.

³⁰ For a general account on the *Corte Costituzionale*, see G. Astuti: *Bestand und Bedeutung der Grundrechte in Italien*, 9 *EuGRZ* (1981), pp. 77 ff.; Malcolm Evans: *The Italian Constitutional Court*, 17 *International and Comparative Law Quarterly* (1968), pp. 602 ff.; and Alessandro Pizzorusso: *Cour constitutionnelle italienne*, 33 *Revue internationale de droit comparé* (1981), pp. 395 ff.

³¹ Cf. 68 *Rivista di Diritto internazionale* (1985), pp. 888 ff., at p. 900. Here cited in English from Giorgio Gaja, *op.cit.*, p. 101.

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requiring equality of treatment and protection of *Italian* workers.³² The treaty had provided for the transfer from an *Italian* to a Libyan institution of social insurance for *Italian* nationals residing in Libya in 1957, with the predictable consequence that these people were later entitled to a much lower pensions than would have been the case if no transfer had been made.

The *Corte Costituzionale* seems only on two occasions to have taken another position on the question of the constitutionality of a statute incorporating the treaty.³³ In both cases the circumstances were rather special in that new treaties substituting those which had indirectly been considered unconstitutional had been drafted or even ratified; moreover, in one of the cases the conflict was between a more than 100 year old treaty and the prohibition against the death penalty embodied in Article 27(4) of the Constitution. Accordingly, these two decisions must be considered as exceptions to the general trend of the *Corte Costituzionale* in its endeavour to avoid establishing conflicts between adopted treaties and the Constitution.

12.2.4. Self-Executing Treaty Provisions.

The question whether or not the provisions of a treaty are *self-executing* is in *Italian* law, due to the frequent use of adopting international treaties into domestic law, of comparatively great significance.³⁴ Only to the extent to which an adopted treaty provision can be considered self-executing, is it possible to apply it on the domestic level. Hence the question of self-executing force is examined with regard to the provisions of the treaty. This does not mean that the question is resolved only through an examination of the treaty as an international instrument. The self-executing character of a treaty provision rather appears to courts as the result of the incorporation of the treaty into the *Italian* legal system within the context of rules and principles that are applicable otherwise.

There is no clear statement in the available case-law concerning the elements that are regarded as necessary for a treaty provision to be considered as self-executing. The basic idea expressed by courts is that a provision is

³² Cf. 54 *Rivista di Diritto internazionale* (1971), pp. 688 ff.

³³ See decision No. 54/1979, *re Cuillier*, reported in 62 *Rivista di Diritto internazionale* (1979), pp. 803 ff, at p. 809, and decision No. 132/1985, *Coccia v. Turkish Airways*, reported in 68 *Rivista di Diritto internazionale* (1985), pp. 888 ff., at p. 900.

³⁴ For an in-depth analysis of this question, see Luigi Condorelli: *Il giudice italiano e i trattati internazionali*, Padova (1974), pp. 49 ff.

Self-Executing Treaty Provisions

self-executing when it does not need to be specified or integrated by other provisions or is "complete".³⁵ Neither of these criteria are particularly clear. In fact, the very concept of "self-executing provisions" provides the courts with a legitimate reason for not applying adopted treaties if this, for one reason or another, is not desired by the Court.

Italian courts have, compared to the courts of other countries, from time to time ruled quite strangely on the self-executing character of adopted treaty provisions. In relation to G.A.T.T., for example, *Italian* courts have, contrary to the courts of other European countries and the Court of Justice, ruled that its provisions are self-executing,³⁶ whereas the provisions of the UN-Covenant were not found to be self-executing (see *infra* section 12.3). Since in its decision of 14 July 1982, *re Iaglietti*, the *Corte Suprema di Cassazione*, has stated in general terms that "... the norms of the European Convention on Human Rights - apart obviously from those provisions the content of which, after the use of the habitual methods of interpretation, is to be considered so general that it does not express sufficiently specific rules - are directly applicable in *Italy*" (emphasis added),³⁷ there is no need for a comparative analysis to elaborate further on the question of self-executing provisions.

12.3. The Application of the European Convention.

The application of the ECHR in domestic *Italian* law follows, generally speaking, the pattern outlined in the previous sections.³⁸ Although the Convention has been referred to on a large number of occasions, its

³⁵ For the latter case, see, for example, decision No. 103/1976, *Ministero del tesoro v. Mander Brothers Ltd.*, where the *Corte Suprema di Cassazione* noted that there was a "... direct legal relation of a binding character" between the *Italian* State and the alien who had suffered injuries or damage and said that "... such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before *Italian* courts." Reported in 99 *Foro Italiano* I (1976), pp. 2464 ff., at p. 2465. Here cited in English from 3 *IYIL* (1977), p. 350.

³⁶ See Giorgio Sacerdoti: *Application of G.A.T.T. by Domestic Courts: European and Italian Case-law*, 2 *IYIL* (1976), pp. 224 ff.

³⁷ Cf. 69 *Rivista di Diritto internazionale* (1986), pp. 143 ff., at p. 145.

³⁸ Extracts and summaries in English and French of *Italian* case-law regarding the application of the Convention in domestic law can be found in 17 *Yearbook* (1974), pp. 663 ff.; 19 *Yearbook* (1976), pp. 1132 ff.; 20 *Yearbook* (1977), pp. 767 f.; 21 *Yearbook* (1978), pp. 760 ff.; 22 *Yearbook* (1979), pp. 525 ff.; 24 *Yearbook* (1981), pp. 530 ff.; and 27 *Yearbook* (1984), pp. 352 f.

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application has frequently been as an additional argument and it does not seem to have given cause for the creation of specific principles of interpretation regarding human rights instruments. Moreover, as will be seen, the Convention has been taken into account to a greater or lesser extent in the different cases. In fact, it is difficult to trace a clear practice in the *Italian* courts' application of the Convention. This applies both to the case-law of the different courts as well as the practice of the *Corte Costituzionale*. In this section, a few examples of the application of the Convention in domestic *Italian* law will be given.

The *Italian* Constitution contains a catalogue of fundamental rights which to a great extent overlap with and in some instances go even farther than the provisions of the ECHR. This fact may explain why the *Italian* courts tend to apply the Convention only as an additional means of interpretation of domestic law: in raising questions of constitutionality, reference is frequently made to both the Constitution and the Convention.³⁹ As the *Italian* Government explained in its pleadings before the European Commission in the *Pfunders (Austria v. Italy) Case*:

"Since the date of ratification by Italy (26th October 1955), the Convention constitutes an integral part of the *Italian* legal system because Article 2 of Law No. 848 of 4th August 1955 makes it compulsory to observe the Convention and to cause it to be observed as "law of the land"; that, as a result, the provisions of the Convention are to be invoked before *Italian* courts in the same way as the Constitution, the Codes and many other municipal law, ignorance of the law and, consequently, of the Convention being no valid excuse..."⁴⁰

It follows from Article 134 of the *Italian* Constitution that the jurisdiction of the *Corte Costituzionale*, insofar as human rights are concerned, is limited to cases referred to it by the ordinary courts in matters specifically falling within the ambit of the rights and freedoms guaranteed by the Constitution. Thus there exists no *Recurso de Amparo* in *Italian* constitutional law (see *infra* section 13.2). To the extent that alleged conflicts between the Convention and domestic law have no constitutional implications, the ordinary courts are competent to rule on the matters themselves.

³⁹ Cf. Valerio Grementieri & Nicolò Trocker: *The Protection of Human Rights in Constitutional Law: Italy* in *Italian National Reports to the IXth International Congress of Comparative Law, Tehran 1974*, Milano (1974), pp. 491 ff., at p. 494.

⁴⁰ Cf. 4 Yearbook (1961), p. 154.

The Position of the ECHR in the Domestic Norm-Hierarchy

12.3.1. The Position of the European Convention in the Domestic Norm-Hierarchy.

Since the Convention is essentially a normal treaty, it holds the position of an ordinary treaty adopted into domestic law within the domestic norm-hierarchy. This was made very clear in decision No. 188/1980, *re Limtrami*, where the *Corte Costituzionale* stated that "... the Court cannot but reassert its settled case-law⁴¹ which rules out treaty provisions, even if general, from the scope of Article 10 of the Constitution..."⁴² Moreover, the Court held that Article 11 of the Constitution "... cannot even be taken into account, as one cannot single out any limitation to national sovereignty with regard to the specific treaty provisions in question."⁴³

The Court's statement that conventions on human rights do not affect sovereignty is not convincing. It probably intended to say that Article 11 of the Constitution considers limitations of sovereignty which are linked with the functioning of international organizations,⁴⁴ that is, that the Court was not prepared to accept the ECHR and the UN-Covenant as falling within the scope of Article 12. The Court's reference to "general" international treaty provisions may indicate that the Court simply confirmed its previous case-law in specific relation to human rights treaties: these international instruments should be applied in exactly the same way as other treaties. This is confirmed by the fact that in its judgment the Court also ruled that the provisions of the ECHR and the UN-Covenant could not be invoked as a means of testing the constitutionality of statutes.

Regarding the concrete application of the Convention in this case, the Court referred to two decisions of the European Commission. Both decisions provided, however, only an additional ground for rejecting the question of unconstitutionality of the statute in question:

"This provision purports to contribute to the definition of what has to be considered a "fair trial", based - among other elements - on the equality of the parties (on "equality of weapons", in the words of the European Commission of Human Rights). The said Commission had the opportunity for asserting that an accused person's right

⁴¹ The Court here referred to its decisions Nos. 48/1979, 32/1960, 104/1969 and 14/1964.

⁴² Cf. 64 *Rivista di Diritto internazionale* (1981), pp. 662 ff., at p. 672. Here cited in English from 5 *IYIL* (1980-81), p. 253.

⁴³ *Ibid.*

⁴⁴ Cf. Giorgio Gaja: *IX Individuals. A) Human Rights*, 5 *IYIL* (1980-81), p. 253.

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to defend himself is not unconditional, but is limited by the State's right to set up rules concerning the presence of lawyers before the courts (Application No. 722/60). When examining an application brought against a State whose laws require the presence of a lawyer before the Supreme Court, the said Commission asserted that the provisions in question does not impose on the contracting States an obligation to grant the accused persons an unconditional freedom of access to the highest courts, and that nothing prevents legislation from providing differently, if it intends to secure a good administration of justice (Applications Nos. 727/60 and 722/60). This interpretation seems perfectly in line with the principle laid down in Art. 24, para. 2, of the Constitution, as interpreted by this Court's judgment No. 125 of 1969.⁴⁵

The interpretation of the Court corresponds to the one given by the Commission⁴⁶ and a previous decision of the *Corte Suprema di Cassazione*.⁴⁷ On the other hand, the decisions of the Commission referred to by the Court did not, strictly speaking, deal with the question whether an accused person has a right to defend himself. In Application No. 727/60 the Commission found that "... the applicant did not fulfil the conditions laid down in Article 6(3)(c), since his status was that, not of a person "charged" but of "plaintiff" appealing for a quashing of the judgment".⁴⁸ Similarly, in Application No. 722/60 the Commission held "... that the right to defend oneself through legal assistance of one's own choosing, as guaranteed by... [Article 6(3)(c)]... of the Convention to everyone charged with a criminal offence, is not an absolute right, but limited by the right of the State concerned to make regulations concerning the appearance of lawyers before the Courts".⁴⁹ Finally, as regards the UN-Convention which was also invoked in the case, the Court expressed itself in a way which may suggest that it does not consider any provisions of the Covenant as self-executing. This view is in contrast to the line laid down by, for instance, *Scandinavian* courts which

⁴⁵ Cf. 64 *Rivista di Diritto internazionale* (1981), pp. 662 ff., at p. 672. Here cited in English from 5 *IYIL* (1980-81), p. 254.

⁴⁶ In Application No. 2645/65, cf. 11 *Yearbook* (1968), pp. 322 ff., at p. 350, the Commission ruled: "Art. 6, para. 3, (c)... does not confer upon the person charged with a criminal offence the right to decide in what way provisions should be made for his defence; whereas the competent authorities are entitled to decide whether the person charged shall defend himself in person or shall be represented by a lawyer of his own choice or appointed *ex officio* as the case may be."

⁴⁷ Decision of 18 November 1972, cf. *Massimario della Cassazione Penale* 1973, pp. 393 ff. For a summary in English, see 17 *Yearbook* (1974), p. 663.

⁴⁸ Cf. 3 *Yearbook* (1960), pp. 302 ff., at p. 308.

⁴⁹ Cf. 9 *Collection*, pp. 1 ff., at p. 3.

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have applied the Covenant in a way similar to the ECHR.

12.3.2. Conflicts between the European Convention and Domestic Law.

There does not seem to be any case in which it is held clearly that there is a conflict between the Convention and domestic *Italian* law and that the latter, due to the *lex posterior derogat legi priori* principle, shall take precedence. However, it is possible to find examples in which the Convention or the UN-Covenant has been applied in a fairly unconvincing way and perhaps, in effect, has been disregarded.

In the decision No. 15/1982, *re Galimberti*, concerning the constitutionality of a decree-law extending the maximum period allowed for pre-trial detention, *inter alia*, under Article 5(3) of the ECHR, the *Corte Costituzionale* stated:

"The said norm of the Convention is not placed as such on a constitutional level, nor does it offer any concrete test, since it refrains from giving any specification whatsoever. Any evaluation of reasonableness that is not linked with a concrete test, but only with a vague and elastic formulation, may become questionable in the absence of a more detailed and deeper analysis."⁵⁰

The "reasonableness" referred to by the Court is the standard laid down in the case-law of the European Court with regard to pre-trial detention.⁵¹ However, the Court did not in any way attempt to apply this standard in the decision at issue.⁵²

In a decision rendered by the *Procuratore della Corte di Appello di Milano* [the Public Prosecutor of Milan] on 21 November 1974, *Zorn*, the application for provisional release, presented by an alien arrested by the *Italian* police pursuant to a warrant issued under Article 663 of the Code of Criminal Procedure, was rejected. Appeal against the decision of the Public Prosecutor could be lodged with the Minister of Justice. Regarding the relationship to the Convention, it was held:

"The European Convention on Human Rights recognizes a right of appeal before the

⁵⁰ Cf. *Giurisprudenza italiana* 1982, II, pp. 85 ff., at p. 100. Here cited in English from 5 IYIL (1980-81), p. 253.

⁵¹ See, for example, Eur. Court H.R., *Ringelsen Case*, Series A, Vol. 14 (1971), Vol. 15 (1972) and Vol. 16 (1973); and Eur. Court H.R., *Stögmüller Case*, Series A, Vol. 9 (1969).

⁵² Cf. Giorgio Gaja, *op.cit.*, p. 254.

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competent jurisdiction against decisions restrictive of personal liberty, provided that the detention is illegal, whereas in the present case the detention is legal."³³

It should be noted that, since Article 656 of the Code of Criminal Procedure embodies a provision stating that the provisions of the Code in the field of extradition shall be applied with the reservations deriving from international customs and conventions, one is here within the sphere of *sector-monism* (see *supra* section 4.1). This means that in this field international law prevails over domestic law, provided that the domestic rules are embodied solely in the Code of Criminal Procedure.

Article 5(4) of the ECHR lays down that "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". It follows from the wording of this provision as well as the practice of the European Commission and Court (see *infra* section 13.3.4) that an administrative-political organ such as the Minister of Justice does not fulfil the requirements of the said provision. Moreover, as pointed out by Professor *Francesco Francioni*, the decision represents "... also an exercise of illogical thinking: the "unlawfulness" of the detention, indeed, cannot be considered as an *a priori* requisite for the admissibility of judicial review under Art. 5, para. 4, of the said Convention, but rather an element to be established as a result of such review. Whether or not provisional release is to be granted depends upon the outcome of such judicial control over the pertinent application, and not upon an *a priori* and uncontrolled qualification of the arrest as "lawful".³⁴

Thus the Public Prosecutor formally applied the Convention but he did not in effect take its merits into proper account. This can be understood from the way in which, on the one hand, he felt obliged to apply the Convention as valid domestic law and, on the other, he did not want to give it full effect in his concrete application of the law.

It is, however, also possible to find examples of cases in which the Convention is found to have been violated. For instance, in decision No. 8157/1973 the *Corte Suprema di Cassazione* held that a first instance judge's failure to admit an application by the counsel for the defence for the hearing

³³ Cf. *Giurisprudenza Italiana* 1976, II, pp. 28 ff. Here cited in English from 3 IYIL (1977), p. 305.

³⁴ Cf. *Francesco Francioni: IX. Individuals. A) Human Rights* in 3 IYIL (1977), p. 306.

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of witnesses who could refute the evidence of the prosecution witnesses, violated Article 6(2)(d) which stipulates that "[e]veryone charged with a criminal offence has the right [...] to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."⁵⁵

Frequently, it is held that there is no conflict between domestic law and the way in which the Court interprets the Convention. Thus in a decision of 19 February 1973 the *Corte Suprema di Cassazione* did not find that *Italian* law conflicted with the Convention. The appellant was sentenced to five days' imprisonment as he did not inform the police that he was having foreign visitors to stay at his home. He appealed against this decision invoking Article 8 of the ECHR, arguing that in accordance with this provision a person should not be traced by the police. The Court held:

"The question as to whether the norm contained in Article 2 of law No. 50 of 11 February 1948 is in conformity with the Constitution with respect to Article 8 of the European Convention on Human Rights is manifestly ill-founded. Article 8 of the Convention guarantees the right to respect for a person's private and family life but does not include a guarantee for a person not be traced."⁵⁶

Similarly, in decision No. 1131/1968 the *Corte Suprema di Cassazione* held that Article 375 of the Code of Civil Procedure could not be regarded as repealed by Article 5(1)(c) of the Convention, since "[t]his provision of the Convention indeed clearly gives as an alternative reason, sufficient in itself to justify deprivation of liberty, the simple existence of reasonable suspicion that the person in question has committed an offence."⁵⁷

12.3.3. The European Convention as an Additional Argument.

As already mentioned, the most common way in *Italy* to apply the Convention is as an additional argument in the interpretation given to the Constitution. Frequently, this application takes the form of ascertaining that the interpretation of the Constitution reached does not violate the Convention.

⁵⁵ Here cited in English from 19 Yearbook (1976), p. 1135.

⁵⁶ Cf. Massimario della Cassazione Penale 1973, pp. 718 ff. Here cited in English from the extract in 17 Yearbook (1974), p. 664.

⁵⁷ Here cited in English from the extract in 19 Yearbook (1976), p. 1132. See also the *Corte Suprema di Cassazione's* decisions Nos. 6588/1972 and 2628/1973, of which an extract in English can be found in 19 Yearbook (1976), pp. 1132 f.

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Although one can find statements of the *Corte Costituzionale* implicitly rejecting that the Convention is a means of interpretation of the Constitution, it happens frequently that the Convention, in effect, is applied in this way.

In a decision of 15 December 1972 the *Corte Suprema di Cassazione* held that, in accordance with the fundamental principle guaranteed by the Universal Declaration of Human Rights and the ECHR, everyone charged with a criminal offence has the right to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him and also to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Accordingly, the use of the *Italian* language, while obligatory for persons who know *Italian*, can only be maintained in relation to foreigners insofar as they are provided with proper means of translation.⁵⁸

In a judgment rendered only a few months after *re Galimberti*, No. 17/1981, *re Basetto*, the *Corte Costituzionale* showed a somewhat more open attitude vis-à-vis the Convention. The *Tribunale per i minori di Venezia* [Juvenile Court] in an order, concerning a minor's right to a public hearing, had invoked Article 6(1) of the Convention and claimed that it was "... relevant under the Constitution", since "... the Convention provides an indication of the concrete contents of Art. 2 of the Constitution, which guarantees the unfringeable rights of man, and also of Art. 1(2) of the Constitution".⁵⁹ Under the latter provision "sovereignty belongs to the people" and, according to the referring court, this implies the right to a public hearing.

The *Corte Costituzionale* implicitly rejected the view that the ECHR could help in defining which rights are considered unfringeable under the Constitution. It first referred to the various interests which are protected by the Constitution and come into play when the decision as to whether there should be a public hearing is made. Then it went on:

"One cannot assume that on the basis of a provision such as the one contained in the European Convention on Human Rights, implemented in *Italy* through an ordinary statute, the balance of the interests in question should be reserved by the Constitution to the courts, with the consequence that the legislator could have no discretion in

⁵⁸ Cf. Massimario della Cassazione Penale 1973, pp. 347 ff. For an summary in English, see 17 Yearbook (1974), pp. 663 f.

⁵⁹ The order is reported separately in 22 *Giurisprudenza costituzionale* (1977), II, pp. 805 ff. Here cited in English from 5 *IYIL* (1980-81), p. 257.

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arranging for certain proceedings to be conducted *in camera* (see judgment No. 16/1981).

Moreover, it must be pointed out that Art. 6, para. 1 - by stating that "judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial [...] where the interest of juveniles [...] so require, or to the extent strictly necessary in the opinion of the court [...] where publicity would prejudice the interests of justice" - does not imply that the said exception must be affected by the courts rather than by statute. The same applies to Art. 14, para. 4, of the International Covenant on Civil and Political Rights - adopted on 16 december 1966 and ratified by on the basis of Law No. 881 of 25 October 1977 - according to which "in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation".⁶⁰

Thus, the Court examined in substance some aspects of Article 6(1) of the ECHR and of Article 14(4) of the UN-Covenant. The latter provision does not, however, specify how the exception to the principle that hearings are public should be made.

In decision No. 62/1981, *re Pinna*, the *Corte Costituzionale* considered the question of constitutionality of section 435 of the Code of Criminal Procedure, insofar as it allows a conviction for a crime committed during a judicial hearing. After having considered various provisions of the Constitution, the Court concluded that an accused person has no right under the Constitution to an appeal against conviction which would necessarily involve a retrial. The Court added:

"One cannot deem that the situation was altered by effect of Art. 14, para. 5, of the International Covenant on Civil and Political Rights [...] Apart from the reasons of a general character given in judgment No. 188 of 1980 (para. 5 of the reasons concerning the law), especially with regard to Art. 2, para. 2 - which provides for legislative measures on the part of the contracting States for giving effects to rights recognized in the same Covenant - one may add that even now there is no conflict between Art. 14, para. 5, and a system providing for a conviction for a crime to be reviewed on its merits only when there has been an appeal alleging that serious irregularities affected the proceedings and the judgment and the said appeal has been allowed (Art. 11, para. 2, of the Constitution)."⁶¹

It is not quite clear why the Court referred to the UN-Covenant. The position of the quoted passage in the decision indicates that the Court was concerned

⁶⁰ Cf. 65 *Rivista di Diritto internazionale* (1982), pp. 400 ff. Here cited in English from 5 *IYIL* (1980-81), pp. 256 f.

⁶¹ Cf. 65 *Rivista di Diritto internazionale* (1982), pp. 402 ff. Here cited in English from 5 *IYIL* (1980-81), pp. 257 f.

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more with examining the question of constitutionality of a provision in the Code of Criminal Procedure than with ascertaining whether this provision had been modified by the effect of the statute implementing the Covenant. However, the Court has on other occasions ruled out the possibility of reviewing the question of constitutionality of statutes with regard to the latter. Since the Court did not find any conflict between Article 14(5) of the Covenant and the domestic provision, it might have been the Court's intention to give an *obiter dictum* with the idea of preventing a question of constitutionality from being raised in further orders.

Under Article 14(5) of the Covenant "... everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The Court's view that this provision does not imply the right to a full retrial seems to be consistent with the wording of the text.

CHAPTER 13

The Application of the European Convention in a "Monist" System: Spain

13.1. Introduction.

Spain became a member of the Council of Europe on 24 November 1977 and at the same time signed the ECHR. This took place even before the present *Spanish* Constitution went into force. The Convention was subsequently ratified by *Spain* on 4 October 1979 after the Government had obtained authorization to do so from the *Cortes Generales* on 28 June 1979 in accordance with Article 94 of the Constitution.¹ The text of the Convention was subsequently published on 22 December 1979.² Following ratification, *Spain* recognized for a period of three years from October 1979 the compulsory jurisdiction of the European Court of Human Rights, on the condition of reciprocity; and this was followed by the acceptance of the right of individual petition, effective as of 1 July 1981.³

13.2. The Effect of Treaties in Domestic Law.

In accordance with the constitutional tradition,⁴ the *Spanish* Constitution of 1978 contains in Article 96(1) a provision concerning the general status of international treaties in domestic *Spanish* Law. This provision reads as follows:

"Validly concluded international treaties, once officially published in *Spain*, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law."⁵

It follows that treaties become directly applicable in domestic law with the

¹ See *Boletín Oficial de las Cortes/Congreso de los Diputados*, 5 July 1979, No. 5-III.

² *Ibid.*, No. 213, 5525.

³ *Ibid.*, 30 June 1981.

⁴ See Article 65 of the Republican Constitution of 1931.

⁵ Here cited in English from the official translation in *Documentación Administrativa*, No. 180, extraordinario, Octubre-Diciembre 1978.

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only requirement being their prior official publication in *Spain*. This condition cannot be seen as an act of incorporation since it does not mean that a statute or any other legislative act stating that the treaty shall form part of domestic law must be passed. It only indicates that the treaty, like other acts of Parliament, needs to be published in *Spain* in order to comply with the constitutional provisions on the proclamation of legislative acts, in order to enter into force in domestic *Spanish* law.⁶

Since Article 96 applies to all kinds of treaties, human rights treaties - including the ECHR - fall under its scope. Thus the Convention becomes applicable law in *Spain* and it is, therefore, binding upon domestic courts in the same way as domestic law.⁷ Within the domestic norm-hierarchy, validly concluded treaties are situated *above* ordinary legislation and *below* the Constitution. Although the debates on the draft Constitution eliminated an express provision stating that treaties shall take precedence over ordinary legislation, this conclusion may in fact be drawn from the final wording of Article 96(1) which stipulates that treaties "... may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law." This means, according to *Spanish* legal

⁶ However, José Pastor Ridzvejo: *Curso de derecho internacional público*, Madrid (1986), p. 170, has described this system in the following way: "The present *Spanish* system regarding the application of treaties may be described as a moderate and reasonable dualist one. Dualist since it requires a formal act of reception. And moderate and reasonable because that reception is implemented through mere publication, and not through the order of execution of a treaty by means of law."

[El sistema español actual sobre aplicación interna de los tratados puede ser calificado como de dualista moderado y razonable. Dualista porque exige un acto de recepción. Y moderado y razonable porque tal recepción se hace por la simple publicación, no por la orden de ejecución de un tratado mediante una ley.]

⁷ Enrique Linde: *Capítulo VII* in Enrique Linde et alii: *El sistema de protección de los derechos humanos*, Madrid (1983), p. 179, states: "Concentrating now on the matter of the European Convention of Human Rights, we arrive at the conclusion that once it is officially published in *Spain* pursuant to Article 96, it will form part of the *Spanish* legal order, which is also true for all treaties and international agreements on fundamental rights signed by *Spain*. Consequently, the former will be of direct and compulsory application by *Spanish* authorities and tribunals."

[Centrandonos ahora en la consideración del Convenio Europeo de Derechos Humanos, llegamos a la conclusión de que, una vez publicado oficialmente en España conforme a lo que dispone el artículo 96, formará parte del ordenamiento jurídico español, lo que se puede aplicar a la totalidad de los tratados y acuerdos internacionales en materia de derechos fundamentales suscritos por España. Por consiguiente, aquel será de aplicación directa y obligada para las autoridades y tribunales españoles.]

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literature, that treaties cannot be derogated from by an *a posteriori* statute.⁸

Surprisingly, however, Article 10(2) of the *Spanish Constitution* embodies another and different provision with regard to *inter alia* the Convention. This provision stipulates:

"The standards relative to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by *Spain*."

It follows from the wording of this provision that the ECHR is one of "the international treaties" ratified by *Spain* on the basis of which the Constitution shall be interpreted.

First, one may ask why the *Spanish Constitution* embodies two clauses on the status of international treaties. A proper answer to this question can only be given with reference to the period of the *Spanish* transition to democracy. Second, a number of questions related to the interpretation of these two provisions may be posed.

As is well known, the *Spanish Constitution* of 1978 was the result of a compromise between a number of political forces. Several of these were in open opposition to Francoism while others, *inter alia*, the center party UCD, which had won the majority in the first general election after the dictatorship and was thus in office in that period, was more ambiguous in its attitude towards the regime which had just come to an end. This added to the difficulties of achieving consensus on the draft Constitution.⁹

⁸ See, for example, the survey in Araceli Mangas Martín: *Cuestiones de Derecho Internacional Público en la Constitución de 1978*, Revista de la Facultad de Derecho de la Universidad Complutense, No. 61 (1981), pp. 143 ff.

Accordingly, José Pastor Ridzejo, *op.cit.*, p. 169, states that Article 96(1) "... unequivocally means that the derogation, modification or suspension of a treaty cannot be implemented in the domestic sphere by means of law. The supremacy of treaties over domestic legal provisions of an inferior rank to constitutional rules is thereby proclaimed, be they prior or posterior to the treaty itself."

See also Drzemezewski (1983), pp. 169 f., with further references.

A different position is taken by Enrique Linde, *op.cit.*, pp. 173 ff., who defends the application of "the principle of competence" rather than "the principle of hierarchy" in these cases.

[... da a entender de manera inequívoca que la derogación, modificación o suspensión de un tratado no puede realizarse a efectos internos por vía de ley. Se proclama así la supremacía de los tratados sobre las disposiciones internas que tengan rango inferior al constitucional, sean anteriores o posteriores al tratado.]

⁹ There is a long bibliography on the *Spanish* transition to democracy. On the Constitutional process, see most recently, Gregorio Peces Barba, *La elaboración de la Constitución de 1978*, Centro de Estudios Constitucionales, Madrid (1989).

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One of the areas in which this consensus had been most difficult to achieve in the *Congreso de los Diputados* [the Lower House of the Spanish Parliament] was the draft Article which regulated the right to education. At this stage of the proceedings, the draft Constitution contained only one provision - Article 96(1) - which regulated the status of international treaties in domestic *Spanish* law.

When the draft Constitution went to *El Senado* [the Upper House of the Spanish Parliament] the Government introduced Article 10(2), initially as a clause integrating international treaties on human rights into domestic law, and at a later stage as the interpretation-clause which was finally passed. In spite of the support the Socialist Party PSOE and other forces of the left had previously expressed for the international systems for the protection of human rights, they strongly opposed the inclusion of this provision in the Constitution.

The key to this was to be found in Article 27(6) of the draft Constitution itself. The center had forced the socialists to recognize "the right of individuals and legal entities to set up teaching establishments", but the Socialist Party had succeeded in not letting be included the right to "direct" them in this provision. Once negotiations on this point had been concluded, the Government tried to modify it by introducing Article 10(2). According to this Article, all fundamental rights, including the right to education, had to be interpreted in conformity with the international treaties in this field ratified by *Spain*. Among these, the International Covenant on Civil and Political Rights of 1966 had then just been ratified. Article 18(4) of the Covenant lays down that the States have to respect the liberty of parents or of legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions". One would have thought that, thanks to the new Article 10(2), this provision would be the criterion for interpreting Article 27(6) of the new Constitution. This is why the socialist leader in *El Senado* talked of a "parallel Constitution" that would thereby be created. However, the Article remained in the final text of the draft Constitution which was eventually passed.

Thus there is no overlap between the two provisions in the sense that Article 96(1) enables the authorities, including the judiciary, to apply international treaties directly as domestic law while the interpretation-clause in Article 10(2) is applicable in cases where a constitutional right has to be interpreted. What follows is that Article 10(2) can only be applied when a right *included* in the Constitution is being touched upon. In other words, when a treaty protects a right which is not embodied in the Constitution, it is applicable domestic law, but the treaty is not an obligatory means of interpretation of the Constitution itself. In this sense, Article 10(2) does not cover all the cases in which Article 96(1) is applicable.¹⁰

¹⁰ On this point, Araceli Mangas Martín, *op.cit.*, p. 150, rightly states that "... international agreements on human rights concluded by *Spain* form part of our legal order in accordance with Article 96 [...] On the other hand, this Article 10(2) does not refer to international conventions as internal law, since the explicit reference to the Universal Declaration of Human Rights and to other international conventions on the subject is only made with a view to the interpretation of the rights and freedoms embodied in the Constitution."

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To the extent a treaty embodies a right which is not contained in the Constitution, Article 10(2) will, as mentioned above, not be applicable. This has certain procedural consequences. Essentially, it means that in such cases the violation of a right embodied in the treaty cannot be invoked before the *Tribunal Constitucional* but only before the ordinary courts. The special procedure before the *Tribunal Constitucional* for the protection of *fundamental* rights, the so-called *Recurso de Amparo*, covers only rights embodied in the Constitution itself.

Since all rights protected by the Convention are with no exception embodied in the *Spanish* Constitution, Article 10(2) is always applicable when a violation of the former is alleged. One may therefore talk about a *double incorporation* of the Convention into domestic *Spanish* law. In practice this means that ordinary *Spanish* judges may - and shall - apply the Convention, since by virtue of Article 96(1) it has become a part of domestic *Spanish* law. Since *Spanish* courts are moreover bound by the Constitution and frequently faced with the interpretation of its provisions, under Article 10(2) they have to apply the Convention as an obligatory means of interpretation. Consequently, in all cases in which the question of the application of the Constitution is at stake, the case may be brought before the *Tribunal Constitucional*.

Where in previous *Spanish* legal writings there was a tendency to criticize this double incorporation of human rights treaties, contemporary *Spanish* legal literature qualifies the double incorporation as a "singular fact" and points to the constitutional status the Convention has thereby acquired.¹¹

13.3. Specific Problems related to the Application of the European Convention in Spain.

A number of questions have arisen from the approach to Article 10(2) of the

[... los acuerdos internacionales concluidos por España sobre derechos humanos forman parte de nuestro ordenamiento en virtud del art 96 [...] Por el contrario, este art 10.2 no apela a los convenios internacionales en cuanto derecho interno, sino que la referencia explícita a la Declaración Universal de Derechos Humanos y a otros convenios internacionales sobre la materia se hace solo a efectos de interpretación de los derechos y libertades incluidos en la Constitución...]

¹¹ The former *Spanish* judge in the European Court of Human Rights, Eduardo García de Enterría: *Valeur de la jurisprudence de la Cour Européenne des droits de l'homme en droit espagnol* in Matscher & Petzhold (1988), p. 222, talks of "... un cas à tout fait singulier de valeur constitutionnelle directe de la Convention Européenne qui résulte de l'article 10 § 2 de la Constitution de 1978."

Araceli Mangas Martín, op.cit., p. 150, for her part, qualifies the double incorporation as a "singular legal technique" and Article 10(2) as a "guarantee clause".

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Spanish Constitution adopted by *Spanish* legal scholars. The first and foremost of these relates to the extent to which Article 10(2) can be seen as a *real* interpretation-clause. Although Article 10(2) applies the term "interpretation" to the Constitution, there are nevertheless a number of controversies deriving from this passage that may give rise to doubts as to the real meaning of this Article as an interpretation-clause.

First, it should be emphasized that the Convention is always an applicable parameter under Article 10(2) since all the rights protected either in the Convention itself or in its Protocols are without exception included in the *Spanish* Constitution.

Since all the rights protected by the Convention shall be applied in order to interpret constitutional rights, the case-law of the European Court of Human Rights - *Spain* having ratified its compulsory jurisdiction - must, to the extent it may be relevant to the case in question, be binding upon domestic *Spanish* Courts.

Accordingly, *Spanish* doctrine,¹² as well as the *Tribunal Constitucional* itself, has accepted the "constitutional value" of the judgments of the European Court of Human Rights not only in interpreting the rights embodied in the Convention, as granted by Article 45 of the Convention itself,¹³ but also, indirectly, in interpreting the rights embodied in the *Spanish* Constitution. Thus Professor *Eduardo García de Enterría* has explained:

"[P]ar le jeu combiné d'un double renvoi (renvoi de l'article 10 § 2 de la Constitution à la Convention et renvoi de l'article 45 de la Convention aux arrêts de la Cour européenne), la jurisprudence de la Cour européenne est devenue directement pertinente en Espagne pour l'interprétation de la Constitution du pays."¹⁴

To what extent the decisions of the other Convention bodies have the same value as judgments of the Court is, however, still open to discussion, since the decisions of the Commission and of the Committee of Ministers have

¹² See, for example, Enrique Linde, *op.cit.*, p. 179.

¹³ This article vests the European Court of Human Rights with the power to interpret the Convention, by stating that "[t]he jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48."

¹⁴ Cf. *Eduardo García de Enterría*, *op.cit.*, p. 224.

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rarely been referred to by the *Tribunal Constitucional*.¹⁵ In one judgment (Judgment No. 114/84¹⁶) the *Tribunal Constitucional*, on the one hand referred to a resolution of the Committee of Ministers as grounds for its decision and, on the other, noticed that "... in our legal order its meaning needs not to be taken into consideration on the basis of Article 10(2) of the Constitution [...] The relevant interpretation according to Article 10(2) of the Constitution is only that of the European Court and not that of the Committee of Ministers."

A specific problem emerges in relation to what extent the case-law of the European Court should have the same binding force on domestic *Spanish* courts in cases in which the Court has applied the so-called *dynamic interpretation* of the Convention. The problem arises when an *emerging right* developed by the European Court is not expressly protected by the *Spanish* Constitution, as may be the case in the future. In such cases there is, in spite of the wording of Article 10(2), hardly any basis for claiming that the *Spanish* courts should be prevented from applying the case-law of the European Court, since the "new" right established by the European Court is nothing but the consequence of the proper interpretation of the Convention. Accordingly, this must also be the proper way for the *Tribunal Constitucional* to interpret the rights embodied in the *Spanish* Constitution.¹⁷

Furthermore, a distinction has been made between the different ways in which the case-law of the Court may have binding effect on domestic *Spanish* courts.¹⁸ On the one hand, both the "new" rules deriving from the *dynamic interpretation* and the main *principles of interpretation* laid down by the European Court have the effect of introducing, respectively, new rights in the bill of rights and judicial precedents which are *binding* both upon the *Tribunal Constitucional* and the ordinary courts in cases involving rights protected by the Constitution. On the other hand, the *interpretation techniques* employed by the European Court in each case (*i.e.* empirical, historical, pursuing a *European standard* or leaving room for the State's

¹⁵ See the survey in Carlos Fernandez de Casadevante: *La aplicación del Convenio Europeo de Derechos Humanos en España*, Madrid (1988), pp. 140 ff.

¹⁶ Cf. BOE 29.11.84.

¹⁷ See Miguel Angel Aparicio: *La cláusula de interpretación del artículo 10.2 de la Constitución Española como cláusula de integración constitucional*, unpublished paper presented at the Universidad de Granada, November 1988, pp. 21 ff.

¹⁸ *Ibid.*, at p. 20.

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margin of appreciation etc.) should *not* have such binding effect on domestic law-enforcing authorities. Since this question has been addressed by legal literature only very recently, it cannot yet be said whether or not this position will be generally accepted or discussed. It may well be regarded as the proper way to interpret the so-called *expansive function* which legal writers have accorded to 10(2) of the Constitution.¹⁹ However, seen from an analytical point of view it may be questioned to what extent, if at all, it is possible to distinguish between the *principles of interpretation* and *interpretation techniques*.

Two other questions on the interpretation of Article 10(2) have been discussed in *Spanish* legal writings.

First, is Article 10(2) applicable in cases in which a constitutional right does not need to be *interpreted*? The classic theory on legal interpretation liked to state that *in claro non fit interpretario*. This is the position of most *Spanish* legal writers on Article 10(2).²⁰ This clause should then only be applicable when a constitutional provision on human rights was not in itself sufficiently clear. However, this principle can hardly gain support from a realistic point of view. Since the provisions to be applied are embodied in the Constitution itself, it is very hard to imagine a way of doing this without some previous interpretative work.²¹

Second, it has been discussed whether there is any possibility of an *interpretario in pejus* of the rights embodied in the Constitution itself by virtue of Article 10(2).

It has been pointed out that the application of Article 10(2) to a provision of the ECHR, regardless of the different levels of protection provided by the Convention and the Constitution, could in some cases reduce the standard granted by the Constitution. However, this presupposes (1) that the standard provided for in the Constitution in fact is higher than the one provided for in the Convention, and (2) that the *in pejus* application is included under the possible effects both of the Convention itself and of Article 10(2) of the

¹⁹ See Joaquín Ruiz Giménez: *Comentario al artículo 10.2 de la Constitución* in Oscar Alzaga (ed.): *Comentarios a las leyes políticas*, Madrid (1983-), p. 140.

²⁰ See in this way, Araceli Mangas Martín, *op.cit.*, p. 150; Carlos Fernández de Casadevente, *op.cit.*, pp. 51 ff.; and Fernando Garrido Falla: *Comentarios al Artículo 10.2 de la Constitución Española* in Fernando Garrido Falla et alii: *Comentarios a la Constitución*, Madrid (1985), p. 192.

²¹ Cf. Ross (1958), pp. 111 ff.

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Constitution.

Generally speaking, it cannot be assumed that the *Spanish* Constitution embodies a higher protection of human rights than the Convention. Nevertheless, it has been argued in *Spanish* legal literature that this is the case since the Constitution came into force in 1978, whereas the Convention was signed in 1950. In addition, the very nature of the Convention is said to be only the *norma minimale*, i.e. the Convention provides only the *minimum common standard* on human rights within the countries of the Council of Europe. Moreover, this would be precisely what, for a number of reasons, the drafters of the Convention intended²² and, therefore, the proper effect it is expected to have.²³

But, even taking into account the more recent date in which the *Spanish* Constitution came into force, it may be argued that, although it has the power to reduce the scope of action of the Convention as "domestic applicable law" under Article 96(1), this is not the case regarding the application of Article 10(2), due to the fact that judicial interpretation of the text still has to be developed to a greater extent, thus necessitating reference to a framework, for use as a guideline for accuracy. As Professor *Diego Liñán Nogueras* rightly points out "... it is not strange that the courts choose only infrequently to apply directly the provisions embodied in international treaties, given the more precise and advanced national legal body in these areas. For the interpretation of rights and freedoms, however, international texts are extremely important, given the current lack of an adequate internal framework, due to the recency of the Constitution."²⁴²⁵

Therefore, the real question turns out to be the level of protection provided by the Convention and not the fact that it is nearly thirty years older

²² Cf. P. van Dijk & G.J.H. van Hoof: *Theory and Practice of the European Convention of Human Rights*, Deventer (1984), p. 182.

²³ This argument has recently been put forward by Santiago Muñoz Machado: *Prólogo* in Carlos Fernández de Casadevante, op.cit., p. 17. Andrew Z. Drzemezewski, op.cit., pp. 161 f., refers to a similar statement by Diego Liñán Nogueras.

²⁴ Cf. Diego Liñán Nogueras: *Efectos de las Sentencias del Tribunal Europeo de Derechos Humanos y Derecho Español*, 37 *Revista Española de Derecho Internacional*, 1985, p. 367.

²⁵ [...no es extraño que los tribunales de justicia, contando con un cuerpo normativo nacional en esta materia más preciso y avanzado, no acudan con gran frecuencia a la aplicación directa de las disposiciones contenidas en tratados internacionales. En cambio, esa misma actualidad explica que no se encuentre los órganos judiciales españoles con un marco de interpretación de derechos y libertades suficiente. Los textos internacionales ofrecen un marco especialmente importante para cubrir esta necesidad.]

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than the *Spanish* Constitution. In such cases where the Convention has been applied - including the use of the *dynamic interpretation* - by the European Commission and Court, there is no suggestion that it embodies a merely minimum standard for the protection of human rights in Europe today. And, in fact, the large number of applications to the Strasbourg organs confirms this.²⁶

Moreover, this does not mean that the question of lowering the level of protection through the Convention cannot be raised in concrete cases regarding specific rights. There is general agreement that, under such circumstances, the Convention should not be used to lower the domestic level of protection because the Convention itself prohibits any application of its provisions which are not *in bonus*.²⁷ Moreover, the same consequences may be inferred directly from Article 10(2) of the *Spanish* Constitution itself²⁸ which, as it is admitted, bans this kind of application.

Accordingly, in legal theory the problem of lowering domestic standards seems not to have been on the agenda. Nevertheless, it may well be questioned whether the *Tribunal Constitucional* has in practice always applied Article 10(2) in this way.

²⁶ Cf. Eduardo García de Enterría, *op.cit.*, p. 224, who rightly states that "[e]n pratique, tous les Etats européens qui ont signé tranquillement la Convention parce qu'ils étaient convaincus que les droits garantis par leur législation dépassaient largement les normes minimales de protection imposées par la Convention ont constaté parfois avec étonnement qu'ils pouvaient faire l'objet de condamnations... En d'autres termes, la jurisprudence de la Cour [Européenne] a notoirement élevé le niveau de protection des droits de l'homme effectivement reconnus en Europe".

In fact, if this were not the real situation, Article 10(2) of the *Spanish* Constitution could never be applied *in bonus*. Adversely, Santiago Muñoz Machado, *op.cit.*, pp. 17 f., points out that "[i]f the decisions of the Commission and Court of Human Rights could be compared, freedom for freedom, with the Member States' jurisprudences, and especially with the constitutional jurisprudences, it could then be seen how often the protection afforded by internal legal orders is superior to the European standard in those States [particularly] demanding as regards the guarantees of freedom."

[Si se pudieran contrastar, libertad por libertad, las resoluciones de la Comisión y el Tribunal Europeo de Derechos Humanos con las jurisprudencias de los Estados miembros, y especialmente con las jurisprudencias constitucionales, se vería cuantas veces, en los Estados exigentes con las garantías de la libertad, la protección dispensada por el ordenamiento interno aventaja al estándar europeo.]

²⁷ Article 60 of the Convention states that "[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any agreement to which it is a Party."

²⁸ Cf. Carlos Fernández de Casadevante, *op.cit.*, p. 12.

Legal Practice

13.4. Legal Practice.

The ECHR and other international human rights instruments have frequently been applied by *Spanish* courts. The first time Article 10(2) of the Constitution was applied seems to have been in the *Tribunal Supremo's* [Supreme Court] judgment of 3 July of 1979 involving the right to association. The Court ruled that, according to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the right to association, embodied in Article 22 of the Constitution, had to be interpreted in a broad sense, so that restrictions could only be permitted as an exception.

The first example of the *Tribunal Supremo* referring expressly to the Convention in the application of Article 10(2) was in a judgment of 14 August 1979. The case concerned Article 20 of the Constitution protecting the freedom of expression. The Court stated that the domestic rule should be interpreted

"... pursuant to Article 20 of the Constitution and to the Content assigned to the freedom of expression by both Article 19 of the [International] Covenant [of Civil and Political Rights] and Article 10 of the [European] Convention [for the Protection of Fundamental Rights and Public Freedoms], provisions according to which the former Article must be interpreted, as Article 10(2) of the Constitution itself requires."²⁹

The interpretation of the rights embodied in the Constitution is among the assignments of the *Tribunal Constitucional* established in 1981. Although ordinary judges may also rule on the matter, in the bulk of the cases their interpretation is either challenged before the *Tribunal Constitucional* (*Recurso de Amparo*), or the judges themselves ask the Court for a preliminary ruling. Thus, it is for the Court, as the highest judicial instance in these cases, to finally interpret constitutional rights. Consequently, it is also the *Tribunal Constitucional* which primarily has to rule on the interpretation of the ECHR and its position in domestic *Spanish* law.

Accordingly, the *Tribunal Constitucional* has on a number of occasions referred *expressly* to the Convention. Up to 1988, the Convention had, in one way or another, been referred to in more than 70 judgments and other

²⁹ [... conforme al artículo 20 de la Constitución y al contenido que al derecho a la libertad de expresión asignan tanto el artículo 19 del "Pacto" [internacional de derechos civiles y políticos] y el 10 del "Convenio" [europeo para la protección de los Derechos fundamentales y las libertades públicas] preceptos éstos con arreglo a los que debe ser interpretado el primeramente citado, por exigirlos así el artículo 10(2) de la propia Constitución...]

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decisions from the Court.³⁰ Thus the Convention is not only in principle part of domestic *Spanish* law, but also in practice it forms an integrated part of *Spanish* constitutional law. In legal writings the function of the Convention in this connection has been described in a very positive way.

Among the constitutional rights which have been interpreted according to the Convention can be, *inter alia*, mentioned: The right to education (Judgment No. 5/81³¹); the right to life (Judgment No. 53/85³²); the right not to be discriminated against (Judgment No. 22/81³³); the right to object to military service (Judgment No. 15/82³⁴); the right to adhere to trade unions (Judgment No. 53/82³⁵); and the right to due process of law embodied in Article 6 of the Convention, *in concreto* the right to be brought before an ordinary judge (Judgment No. 10/84³⁶ and Judgment No. 44/85³⁷); the right to be defended by a lawyer (Judgment No. 44/87³⁸; Judgment No. 74/85³⁹; Judgment No. 7/86⁴⁰; and Judgment No. 2/87⁴¹); to be informed about the accusation (Judgment No. 5/84⁴²); and to a fair trial

³⁰ Eduardo García de Enterría, *op.cit.*, *passim*, examines 19 judgments from 1981 to 1985. Carlos Fernandez de Casadevante, *op.cit.*, *passim*, refers to 61 judgments and 15 other decisions in the period up to September 1988 and emphasizes that the Convention "... is often used with binding value by *Spanish* courts and is invoked on numerous occasions by private parties as a direct source [...] The Court that most frequently uses European jurisprudence is probably the Constitutional Court."

[... es profusamente utilizado por los Tribunales españoles, con valor jurídico, e invocado en numerosas ocasiones por los particulares, como fuente directa [...] el Tribunal que con mayor profusión utiliza la jurisprudencia europea, posiblemente sea el Tribunal Constitucional.]

³¹ Cf. BOE 24.02.81.

³² Cf. BOE 18.05.85.

³³ Cf. BOE 2.07.81.

³⁴ Cf. BOE 18.06.82.

³⁵ Cf. BOE 18.08.82.

³⁶ Cf. BOE 28.11.84.

³⁷ Cf. BOE 19.04.85.

³⁸ Cf. BOE 19.04.85.

³⁹ Cf. BOE 17.07.85.

⁴⁰ Cf. BOE 18.12.86.

⁴¹ Cf. BOE 10.02.87.

⁴² Cf. BOE 18.12.84.

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within a reasonable period of time (Judgment No. 24/81⁴³; Judgment No. 18/83⁴⁴; and Judgment No. 5/85⁴⁵).

Thus, the application of the Convention in legal practice may be described briefly like this: since the *Spanish* level of protection is relatively high, there is not much room for the application of the Convention in domestic *Spanish* law. Nevertheless, the *Tribunal Constitucional* has on a number of occasions applied the Convention with a positive outcome. What domestic courts, and in particular the *Tribunal Constitucional*, have been doing on these occasions is clarifying the unclear and ambiguous parts of the Constitution in the light of the Convention and the case-law of the European Court.

One recent case, Judgment No. 145/88,⁴⁶ may be taken as an example. It concerned facts which were more or less similar to those in UfR 1990.13 (see *supra* section 8.4) and it illustrates very clearly the main differences between the reasoning of the *Scandinavian* Supreme Courts and the *Tribunal Constitucional*.

The case concerned a so-called *organic law*, i.e. a statute which implements the Constitution directly and which takes precedence over ordinary legislation. The *Spanish* Constitution embodies in Article 24(2) the right to a due process of law "with all the guarantees", but it does not expressly mention the right to be brought before an impartial judge. Section 54(12) of the *Spanish* Criminal Procedures Code of 1892 [*Ley Enjuiciamiento Criminal*] recognizes, however, that a judge can be challenged on the ground that he has been in charge of pre-trial proceedings. A statute of 1967 made exceptions to this principle in a special urgent procedure and in 1980, two years after the Constitution came into force, the Organic Law 10/80 maintained the exception in cases where minor offenses were involved. Section 2 of this statute stipulated:

"Examining judges [*jueces de instrucción*] of the jurisdiction in which the crime has been committed shall be competent to hear and deliver judgment in these cases. In no case shall the cause of challenge provided for in section 54(12) of the Code of

⁴³ Cf. BOE 20.07.81.

⁴⁴ Cf. BOE 12.04.83.

⁴⁵ Cf. BOE 23.01.85.

⁴⁶ Cf. BOE 8.08.88.

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Criminal Procedure be applicable."⁴⁷

In 1987 a judge from Madrid as well as one from Palma de Mallorca, who had to conduct both the preliminary proceedings and then the trial under section 2 of the Organic Law 10/80, asked the *Tribunal Constitucional* independently for a preliminary ruling on the constitutionality of this provision. According to the wording of the question submitted by both courts, the rights to a due process of law "with all guarantees" as embodied in the Constitution, by virtue of Article 10(2), had to be interpreted in accordance with the ECHR. The result of this interpretation was, in these judges' view, that the right to be judged by "an independent and impartial tribunal" set forth in Article 6(1) of the Convention was to be included within the "guarantees" foreseen, in general terms, by Article 24(2) of the Constitution. Moreover, as to the proper interpretation to be given to Article 6(1) of the Convention, both Courts addressed the question as to the rule established by the European Court in the *De Cubber Case*.

Although the Public Prosecutor and the Advocate of the State, who were both parties to the proceedings before the *Tribunal Constitucional*, did not share this view, the discussion was centered on the interpretation of the *De Cubber Case*, and the extent to which the circumstances of both cases could be compared. Further, both the Advocate of the State and the Public Prosecutor stated that the judge, under the challenged provision, was not entitled, strictly speaking, to carry out any "instruction", but only minor preliminary proceedings which would not raise doubts as to his impartiality when he eventually took part in the trial. Consequently, the facts involved in the *De Cubber Case* case were not related to the matter at issue.

The *Tribunal Constitucional* based its decisions solely on the case-law of the European Court, together with a short and vague reference to the inclusion of the right to be judged by an impartial judge within the meaning of the "*Estado de Derecho*" which, according to Article 1(1) of the Constitution, had been settled in *Spain*. The Court ruled that, according to the case-law of the European Court, the same judge cannot act both in the instruction functions and at the hearing of a case. Thus it stated:

⁴⁷ [Serán competentes para el conocimiento y fallo de estas causas los jueces de instrucción del partido en que el delito se haya cometido. En ningún caso les será de aplicación la causa de recusación prevista en el apartado 12 del artículo 54 de la Ley de Enjuiciamiento Criminal.]

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"In brief, what interests us from the *De Cubber Case* is the principle that no accumulation of investigation and judgment functions may take place. The application of this principle shall take place bearing in mind the peculiarities of our legal system taken as a whole and not only as regards certain isolated aspects of it."⁴⁸

Thus the Court found that section 2 of the organic law as a whole was unconstitutional. It is likely that the Court could have found a compromise according to which it could have declared unconstitutional *only* the second part of Article 2 of the Organic Law 19/80 which stated that "[i]n no case shall the cause of challenge foreseen in section 54(12) of the Code of Criminal Procedures be applicable." In doing so, it could have overruled only the impossibility of challenging the impartiality of the judge, but not the settled procedure involving the same judge both in the instruction functions and at the hearing. By this, the Court could have reached a solution, which would have complied with both the ECHR and the established organization of the judiciary in *Spain*. However, the Court decided to apply the "objective impartiality standard" which the European Court had established in the *De Cubber Case* and subsequently also in the *Hauschildt Case*, thus giving the Convention full domestic effect in *Spanish law*.

Moreover, the *Tribunal Constitucional* was aware of the fact that its decision could lead to a rather complicated situation for the judiciary in *Spain*:

"It has not gone unnoticed to this Court that the compulsory distinction between the investigatory function and the judging function affects an organizational principle of the procedure regulated by the Organic Law 10/80 and that, as a consequence, the effects of the application of the abstention and recusal grounds under examination are broader and more complex than those provoked by the application of other grounds that only rarely become relevant. This unequivocally leads to the fact that it is the Legislature who must assume the duty to modify the said procedure or to substitute it by another."⁴⁹

⁴⁸ [En suma, del caso de Cubber lo que nos interesa es el principio de que no puedan acumularse las funciones instructoras y juzgadoras. La aplicación de ese principio habrá de hacerse teniendo en cuenta las peculiaridades de nuestro derecho contemplado en su conjunto y no en algún aspecto aislado.]

⁴⁹ [No se oculta a este Tribunal que la obligada separación entre la función instructora y la juzgadora afecta a un principio organizativo del procedimiento regulado por la Ley Orgánica 10/80 y que en consecuencia los efectos de la aplicación de la causa de abstención o recusación aquí examinados son más amplios y más complejos que los que se provocan por la aplicación de otras causas que sólo actúan muy esporádicamente. Ello conduce a que sea sin duda el legislador quien deba asumir la tarea de reformar ese procedimiento o sustituirlo por otro.."]

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The description of the application of the ECHR in domestic *Spanish* law suggests that the *Tribunal Constitucional* is very loyal in its application of the Convention. The question is, however, whether the Court on some occasions has been too loyal in its application of the Convention. It seems that, as indicated above in section 13.3, regardless of the theoretical point of view adopted by the legal literature, an *in pejus* application of the Convention is possible - and that it has actually been applied in this way.

Certainly, it is difficult to imagine such an application in a direct way, *i.e.* clearly lowering the standard of protection provided by an ordinary statute on the argument that the *Spanish* Constitution, interpreted according to the Convention, obliges the overruling of a legal rule passed by Parliament. This may be the case, however, when the result is to *uphold* a rule or any kind of administrative practice which reduces a fundamental right solely on the grounds that it is permitted under the Convention and regardless of the standard of protection which could be achieved by interpreting the Constitution on its own.

Judgment No. 89/87⁵⁰ of the *Tribunal Constitucional* may be taken as an example of an *in pejus* application of the ECHR. The judgment upheld a decision to the effect that a prisoner should be prevented from seeing his wife in private on the ground that the European Commission had ruled that the deprivation of sexual relations under those circumstances was not "inhuman or degrading treatment" within the meaning of Article 3 of the Convention.

It may be argued that the same conclusion could have been reached from the interpretation of various provisions of the Constitution without taking the Convention into account. The point is, however, that the *Tribunal Constitucional* based its decision on the sole argument that such a practice was not banned by the Convention. In doing so it interpreted Article 15 and 18 of the Constitution, which had been invoked by the applicant.⁵¹ Consequently, the scope of these rights were lowered by virtue of Article 10(2) of the Constitution and the ECHR.

What the *Tribunal Constitucional* ought to have done was of course to

⁵⁰ Cf. BOE 25.06.87.

⁵¹ Article 15 establishes that every person "may under no circumstance be subject to torture or to inhuman or degrading punishment or treatment" while Article 18 protects the right "to honour, to personal and family privacy and to personal reputation".

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look at the Convention and, since the standard embodied herein was lower than the one embodied in the Constitution, only to have applied the constitutional provisions. Clearly, this second part was not made in the judgment.

The same result may be achieved in a less direct way. Sometimes the *Tribunal Constitucional* has referred to either the Convention or the case-law of the Strasbourg bodies not as the main ground for a decision, but as an *a fortiori* argument or even as an *obiter dictum*. Again, the Court seems to be more likely to do so when it has to uphold a decision which, in one way or another, reduces the scope of a fundamental right. The point here is that the Convention could be used in order to add some kind of *political* legitimacy to a judgment of the *Tribunal Constitucional* which reduce the scope of a fundamental right.

Two decisions can be used to illustrate this. In Judgment No. 147/83,⁵² the *Tribunal Constitucional* ruled that the right to a due process of law embodied in Article 24 of the Constitution did *not* include the right to be judged by a jury. Certainly, the Court argued that the jury as an institution was recognized by Article 127 of the Constitution, but this provision had no self-executing character.⁵³ Given that Parliament had not yet decided to pass a statute concerning the issue, the jury could not be included within the scope of the right to a due process of law. The Court deduced this from the Constitution itself, but expressly noted that

"... neither could the jury institution be interpreted as being included amongst the judicial guarantees by means of an interpretation of Article 24, in accordance with Article 10(2) of the Constitution [...] as the alleged guaranty of a trial with jury is not embodied either in the Universal Declaration of Human Rights nor in the Convention of Rome of 4 November 1950 [...] It is therefore not possible to consider the jury institution as one of the procedural guarantees referred to by Article 24(2) of the Constitution."

In Judgment No. 53/85⁵⁴ the *Tribunal Constitucional* ruled that the legislation on abortion which had been passed by the socialist Government was

⁵² Reported in *Jurisprudencia Constitucional* 1983, pp. 870 ff.

⁵³ Compare Article 65(2) of the *Danish* Constitution providing that "[l]aymen shall take part in criminal procedure. The cases and the form in which such participation shall take place, including what cases are to be tried by jury, shall be provided for by statute", cf. Blaustein & Flanz, *Binder IV*, October 1990, p. 22.

⁵⁴ Cf. BOE 18.05.85.

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in accordance with the Constitution, although the judgment compelled Parliament to pass a new statute including new requirements imposed by the Court. The opposition in Parliament had challenged the Statute before the Court, and there had been wide political and social debate all over the country. It is likely that the Court tried to use all the possible arguments to support its decision.

Again, the Convention did not play the decisive role in the judgment. It had been expressly quoted by the applicants, and the Court also referred expressly to Strasbourg case-law: it noted that there was no judgment of the European Court on the issue, but that the Commission had ruled that the term "everybody" or "toute persone" who was entitled to the right to life according to the two official versions of the Convention did not include the *fetus*. It followed that the expression "todos" used in Article 15 of the Constitution did not include it either. Accordingly, the abortion law did not infringe upon the right to life protected by the Constitution.

In these two decisions the Convention was not, on the one hand, used as the principal grounds for granting a restriction but, on the other, it was actually referred to in a situation where it *should not have been related to the case*, since the decision taken was to uphold an alleged reduction of the scope of a fundamental right. Certainly, the *Tribunal Constitucional* is compelled to interpret the Convention if the reduction goes beyond the minimum provided by the Convention; but if, as was the case, the result of this interpretation is that the restriction is not a violation of the Convention, it should not be used as a means by which to interpret the *Spanish Constitution*.

This does not mean that the Convention should not be referred to in the judgments at all but, given that it was, it should have been stated that, although the restriction was allowed for by the Convention, *nothing could yet be said as to the extent to which the restriction complied with the Constitution*. Neither in the former nor in the latter decision did the Court do this. It only stated that, among the reasons for upholding the restriction, was that it was in conformity with the Convention.

One may ask why such an attitude should add anything to a decision granted on domestic arguments. It is clear that on account of its recency the *Spanish* democracy still looks at Europe as having a higher standard than itself as far as human rights are concerned; it may be that the *Tribunal Constitucional* feels it necessary to quote the Convention whenever an imposed restriction on one right is to be upheld. The European argument, it

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might think, will be more likely to be undisputed.

Apart from the above-mentioned cases, the tendency to an *in pejus* application of the Convention seems to be most pronounced in relation to (1) cases involving a *conflict of rights* and (2) as regards the application of the *margin of appreciation* doctrine developed by the European Court. Regarding the former, such a possibility is foreseen by the Constitution, (see e.g. Article 20(4) which limits freedom of expression) as well as by the Convention (see e.g. Article 10(2) on the same issue).

In cases involving a *conflict of rights* both rights must be balanced against each other and, obviously, only one of the rights can be protected on the ground of the other's reduction. In those cases the *Tribunal Constitucional* has no choice: whenever it uses the Convention to define the level of protection of right A, it is applying the Convention at the same time to lower the standard of right B.

It may be argued that the Court should not be prevented from using the Convention in such cases. The lowering of the standard of right B is the natural consequence of the interpretation given to right A, but it can hardly be seen as a direct effect of the use of the Convention. This is true but it is, however, precisely in such cases involving a conflict of rights that in its case-law the European Court has been less clear.

Freedom of expression may be taken as a good example of this. The restrictions allowed by the Convention under the term "the rights of others" are provided for in the *Spanish* Constitution under the general clause in Article 20(4) which states that the right to freedom of expression is limited "by the respect of the rights recognized in this title" (*i.e.* the part of the Constitution "concerning the fundamental rights and duties") and "by the precepts of the laws implementing it". Article 20(4) specifies a number of rights which should be "especially" respected when freedom of expression is exercised: the right to honor, to privacy, to personal reputation and to the protection of youth and childhood. These rights, however, are implicitly included by the general clause of "rights recognized in this title". Their express presence in the wording of Article 20(4) has been qualified as simply "pedagogical",⁵⁵ since those are the rights which may more often conflict with freedom of expression.

⁵⁵ Cf. Alfonso Fernandez-Miranda Campomar: *Comentario al artículo 20 apdos 1-3 y 5* in Oscar Alzaga (ed.), *op.cit.*, p. 501.

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In a leading case on this matter brought before the European Court, the *Barthold Case*,³⁶ the applicant, a German national, had been punished for breaching the norms of fair competition by indirectly giving publicity to his veterinary clinic during a press interview. The German Government claimed before the European Court that the punishment had been justified because it aimed at protecting the rights of the colleagues of the applicant and those of their clients. The Commission found that only the latter purpose was legitimate. The European Court - although it finally decided that the restriction was not necessary in a democratic society - found that the aim of the restriction could be legitimately described as the protection of the "rights of others", without any further specifications.

In another leading case before the European Court concerning privacy as a limit to freedom of expression, the *Lingens Case*,³⁷ Mr Lingens, an Austrian journalist, claimed that his right to freedom of expression had been breached because he had been punished for publishing an article regarding a political affair where the behavior of the Austrian Chancellor, Kreisky, was described as "immoral", "undignified" and "a monstrosity". Finally, the European Court found that in those circumstances the "right to privacy" of the Chancellor had not been violated to such an extent as to justify a restriction on freedom of expression.³⁸

Although these two judgments of the European Court have to some extent influenced the decisions of the *Tribunal Constitucional*, the situation in Spain regarding these two rights as limits to freedom of expression is not yet very clear. The *Tribunal Constitucional* has admitted that, in principle, the right to honor or to privacy allow a stronger restriction on freedom of expression than other rights which do not directly embody subjective rights such as, for instance, the authority of the judiciary. But, on the other hand, it has stated that the conflict is not one between two different rights of citizens. Freedom of expression is a subjective right, but it is also an essential characteristic of democracy, whereas this is not the case regarding the right to honour or privacy. This special nature of freedom of expression, which follows clearly from the case-law of the European Court, also applies when a conflict between the former and the latter arises.

³⁶ Cf. Eur. Court H.R., *Barthold Case*, Series A, Vol. 90 (1985).

³⁷ Cf. Eur. Court H.R., *Lingens Case*, Series A, Vol. 103 (1986).

³⁸ The case arose out of the punishment which the applicant was subjected to for publishing two articles in the Austrian magazine "Profil", just after the Austrian general elections of 1975, accusing the Chancellor, Kreisky, of defending Mr Peter, the leader of the Liberal Party, who had been blamed for an active cooperation with the Nazi regime. The applicant invoked his role as a political journalist in a pluralistic society. Before referring the case to the Court, the Commission had considered that "a politician who was himself accustomed to attacking his opponents had to expect fiercer criticism than other people" (para. 37).

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In Judgment No. 104/86⁵⁹ the *Tribunal Constitucional* stated that whenever the right to honour and the freedom of expression conflict, we are faced with a "... conflict of rights, both of a fundamental rank",⁶⁰ which means that all the circumstances have to be carefully evaluated, but with the difference that the "... guarantee dimension of the fundamental public institution, the free public opinion, is not included in the right to honour".⁶¹ This feature gives freedom of expression, as covered by Article 20 of the Constitution, "... a valuation that goes beyond what is common to and part of all fundamental rights".⁶² In Judgment No. 107/88⁶³ the Court held that the freedom of expression and information were "... not only [...] every person's fundamental right, but that they also lead to the recognition and guarantee of free public opinion, an institution unseverably linked to political pluralism [...] these freedoms being as a result provided with an efficacy that goes beyond what is common to and part of the other fundamental rights, including that of the right to honour".⁶⁴

The main distinction to be made, according to the *Tribunal Constitucional*, is whether or not public matters are involved. If so, the margin given to freedom of expression is wider. When only private issues are concerned, the *Tribunal Constitucional* does not give it the *preferred position* which the right to freedom of expression may have in relation to the right to honor or the right to privacy. The relations between these rights vis-à-vis private citizens have been defined more precisely than in the case-law of the European Court, since the latter has not given a clear definition of the situation of freedom of expression in such circumstances. However, the solution reached is still far from being satisfactory.

⁵⁹ Cf. BOE 13.08.86.

⁶⁰ [... conflicto de derechos ambos de rango fundamental.]

⁶¹ [... dimension de garantia de una institucion publica fundamental, la opinion publica libre, no se da en el derecho al honor.]

⁶² [...una valoracion que trasciende a la que es comun y propia de todos los derechos fundamentales.]

⁶³ Cf. BOE 25.06.88.

⁶⁴ [... no solo [...] derechos fundamentales de cada persona, sino que tambien significan el reconocimiento y garantia de la opinion publica libre, que es una institucion ligada de manera inescindible al pluralismo politico [...] estando por ello estas libertades dotadas de una eficacia que trasciende a la que es comun y propia de los demas derechos fundamentales, incluido el del honor...]

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Other problems related to the content of the freedom of expression - such as the extent to which value-judgments should be as equally protected as information about facts - is still without a equitable answer in the light of the case-law of the *Tribunal Constitucional*. Judgment No. 6/88⁶⁵ illustrates the lack of a clear solution on this point. The *Tribunal Constitucional* ruled that the dismissal of Mr Crespo from the press office of the Ministry of Justice had been unconstitutional since the applicant had used his right to freedom of expression to denounce the wrong functioning of a public office. The main arguments for reaching this decision were, regarding the *content* of Mr Crespo's statements, the public nature of the issue and, surprisingly, the consideration that Crespo's note was a description *of facts* - whether or not they were true - and *not* a *value-judgment*.⁶⁶ It seems as if the *Tribunal Constitucional* thought that a value-judgment, even on public issues, should only be rarely allowed when it includes any defamatory content. In such cases, the presumption of *animus injuriandi* would be preferred to the presumption of *animus criticandi*. Curiously enough, the *Tribunal Constitucional* quoted here - and wrongly, it may be added - the judgment of the European Court in the *Lingens Case*. Certainly, the European Court ruled on that occasion that a careful distinction between facts and value-judgments should be made. But the distinction was made in order to point out that value-judgments by their very nature could not be disputed by the truth; the European Court did not conclude, like the *Tribunal Constitucional* seems to have done, that they are not entitled to a corresponding protection under the right to freedom of expression.⁶⁷

Thus it can be said that the case-law of the *Tribunal Constitucional* involving a restriction on a right on the grounds of protecting the "right of others" is in general consistent with the trends provided by the case-law of the European Court, *inter alia*, in the *Lingens Case*. The real problem is that,

⁶⁵ Cf. BOE 5.02.88.

⁶⁶ The Court stated that "... the statements on account of which the plaintiff was dismissed were made and understood by the receivers as relating to facts, regardless of what their veracity was."

[...las declaraciones por las que el actor fue despedido se formularon y se entendieron por los receptores como relativas a "hechos", cualquiera que fuese su veracidad.]

⁶⁷ The European Court held in the *Lingens Case* that "in the Court's view, a careful distinction needs to be made between facts and value-judgment. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof", cf. Eur. Court H.R., *Lingens Case*, Series A, Vol. 103 (1986), para. 44.

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on this point, the European Court itself has not given a clear solution to all the questions which have arisen.

Finally, yet another way in which the *in bonus* application of the Convention may be frustrated should be mentioned. It concerns the cases in which the European Court has ruled that the contracting States of the Convention enjoy a *margin of appreciation* in their application of the Convention.

As is well-known, the *margin of appreciation* doctrine is one of the achievements of the European Court which has been most widely debated. Broadly speaking, it lets the Contracting States enjoy a certain margin to ascertain whether a right protected by the Convention should be limited by a domestic restriction. The only accurate guideline as to this doctrine is twofold: (1) That the margin the States enjoy depends on the right towards which the restriction is aimed as well as the reason for this, and (2) that in any case it is for the European Court to control the extent to which the State's restriction complies with the Convention. The most strongly disputed point is whether, by leaving this margin to the Contracting States, the so-called *European standard* may be properly achieved.

The main problem posed by such a doctrine is that once the European Court has ruled that a said aim to limit a right is left to the margin of appreciation of the States, the States themselves could use this argument to restrict the right at issue.

In so doing the national court can apply the Convention in a way similar to the one described above. Whenever the *margin of appreciation* is considered as the *only ground* for granting a restriction, a clear application *in pejus* is made. When the *margin of appreciation* is used to add support to a restriction, some kind of *political use* of the Convention might be found.

The latter might be the case of the *Tribunal Constitucional's* judgment in Judgment No. 62/82⁶⁸ which concerned "morals" as a limit of freedom of expression. An educational book, addressed to children and adolescents, had been published under the title *A ver* ["let me see"]. It included a number of texts and photographs on sexual matters and was accused of being obscene by several Catholic associations. A court sentenced the publisher to a fine and barred him from publishing for a period of six years. The sentence was subsequently upheld by the Supreme Court. He then brought the case before

⁶⁸ Cf. BOE 17.11.82.

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the *Tribunal Constitucional* alleging a violation of his right to freedom of expression.

The *Tribunal Constitucional* focussed on the guarantees that should be taken into account when the right to freedom of expression is limited on the ground of protecting morals. Besides this, it expressly considered the case-law of the European Court before reaching a decision on the matter.⁶⁹ It was indeed easy for the *Tribunal Constitucional* to find a relevant case in the case-law of the European Court. In 1976, the latter had decided the *Handyside Case*⁷⁰ which contained facts quite similar to the case now pending before the *Tribunal Constitucional*.⁷¹

According to the *Tribunal Constitucional* two kinds of guarantees, as laid down in the European Convention, were to be analyzed in this case: (1) Whether the restrictions imposed on freedom of expression were necessary in a democratic society, and (2) whether they had been applied to satisfy the purpose for which they had been prescribed.

As to the necessity of imposing such a restriction on freedom of expression in a democratic society, the *Tribunal Constitucional* followed the European Court in three points of its reasoning: (1) In weighing the importance of this freedom for a truly democratic society; (2) in balancing the fact that the book was aimed at children, and that the protection of childhood led to special considerations; and (3) applying the requirement of proportionality as the final test that should be applied to the restriction.

The *Tribunal Constitucional*'s decision is without any doubt the one in

⁶⁹ In order to determine "... to what extent and within what limits the freedom of expression may be limited by the idea of a public moral [...] it must be surrounded by sufficient guarantees to avoid that under an ethical concept, juridified insofar as an ethical minimum is necessary for social life, an unjustified limitation of fundamental rights and public freedoms takes place [...] to specify these guarantees, we have to refer to the Convention of Rome [of 4 November 1950]."

[... en que medida y con que alcance puede ser delimitada la libertad de expresion por la idea de moral publica [...] ha de rodearse de las garantias necesarias para evitar que bajo un concepto etico, juridificado en cuanto que es necesario un minimum etico para la vida social, se produzca una limitacion injustificada de derechos fundamentales y libertades publicas [...] para precisar tales garantias hemos de acudir al Convenio de Roma.]

⁷⁰ Cf. Eur. Court H.R., Series A, *Handyside Case*, Vol. 24 (1976).

⁷¹ Handyside had been charged and prosecuted in the United Kingdom under the Obscene Publications Act (of 1959, amended in 1964) for publishing the English version of the so-called *Little red school book*. After exhausting the domestic remedies, he brought the case to the Commission which eventually referred it to the European Court. Finally, the European Court decided that Article 10 of the Convention had not been violated by the United Kingdom.

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which the influence of a judgment of the European Court has been greatest. To some extent, this judgment may even be regarded as having received a too great influence, notably by the *margin of appreciation* doctrine. In applying this doctrine the *Tribunal Constitucional* stated that the sentence imposed on the publisher "... although broad, does not exceed from the margin of appreciation which corresponds to the Legislature when fixing criminal penalties, and nor does their content exceed the legal goods [*bienes jurídicos*] protection within which the limits must be recognized by the margin of appreciation corresponding to judicial discretion."⁷² However, the problem here is that the *margin of appreciation* doctrine is taken from "*the-less-than-clear-cut case*"⁷³ which has often been criticized precisely for the way in which it is applied.⁷⁴

From this judgment onwards, the *Tribunal Constitucional* has often ruled that a restriction to the freedom of expression should be "proportionate to the aim pursued" and that its aim should be "legitimate" - although the proportionality has very rarely been cross-checked with the criterion of a "democratic society". But, on the other hand, the Court has usually ruled that when a lower court has considered the issue, it is not for the *Tribunal Constitucional* to review it, unless the former has argued in a manifestly unreasonable way. Only when facing a clearly not reasoned decision of the lower court, can the *Tribunal Constitucional* conclude that the former has breached the Constitution. In other words, the *Tribunal Constitucional* can only review a decision if the so-called *constitutional perspective* has not been taken properly into account by the lower court. This is the effect of the *margin of appreciation* that the lower court enjoys.

⁷² [... aunque amplia, no excede del margen de apreciacion que corresponde al arbitrio del legislador para la fijacion de las penas, y su contenido no excede tampoco de la proteccion de los bienes juridicos lesionados dentro de los limites que es necesario reconocer al margen de apreciacion que corresponde al arbitrio judicial." (para. 6)]

⁷³ Cf. John A. Andrews: *The European Jurisprudence of Human Rights*, 43 Maryland Law Review (1984), pp. 463 ff., at p. 496.

⁷⁴ See, for instance, P. van Dijk & G.J.H. van Hoof, op.cit., p. 435, who state that "the conclusive consideration for the Court was evidently that no such thing as 'a uniform European conception of morals' exists. Even if this statement is correct, it still leaves one with the question of whether it is then not up to the Court to develop such a 'European conception' in its case-law, since the term morals is repeatedly mentioned in the Convention."

CHAPTER 14

Conclusions to Part IV: the Position of the European Convention in Domestic Scandinavian Law in a Comparative Perspective

14.1. The General Position of the European Convention.

The *Scandinavian* countries have traditionally been regarded as "dualist" countries where treaties do not form part of the domestic legal system if not incorporated into domestic law by legislation or delegated legislation, although no constitutional provisions to this effect exist. In this respect the position of treaties in *Denmark*, *Norway* and *Sweden* is similar to that of those in *Italy* and the *United Kingdom*. In all these countries there does exist, however, a principle according to which courts may presume that it was not the intention of the Legislature to legislate contrary to undertaken international obligations. In *Spain*, on the other hand, treaties, once officially published, automatically become domestic law by virtue of Article 96 of the *Spanish Constitution*.

In *Denmark* and *Norway* are, moreover, as distinct from the other countries discussed here, nor customary international law part of the law of the land.

Since the ECHR has not been incorporated in the *Scandinavian* countries nor in the *United Kingdom*, it is not a part of domestic law. In *Italy* the Convention has been *adopted* into domestic law by virtue of a so-called *execution order* (see *supra* section 12.1). In *Spain*, on the other hand, the Convention is automatically incorporated into domestic law by Article 96 of the Constitution and by virtue of Article 10(2) it also constitutes an obligatory means of interpretation of the Constitution, provided that the question touches upon a right embodied in the Constitution itself. This is known as the *double incorporation* of the Convention (see *supra* section 13.2). Since the *Spanish Constitution* guarantees all the rights protected by the Convention, the latter is for the present always a obligatory means of interpretation of the Constitution. In theory the legal position should then be clear; yet, as has already been seen, theoretical points of departure within this particular field of law are one thing, the way in which they are applied in practice another.

In chapter 10 it was concluded that the ECHR is *a source of law* in domestic *Scandinavian* law which, however, at the moment appears to be

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more forceful in *Denmark* and *Norway* than in *Sweden*. This conclusion was based on observations which may be summarized briefly as follows:

When one looks at the case-law concerning the ECHR in the *Scandinavian* countries one common feature is obvious: *the courts do not recognize conflicts between the Convention, as interpreted by them, and domestic law*. Consequently, with a few exceptions, they have managed to avoid taking a stand on how a (clear-cut) conflict between the Convention and domestic law should be resolved. These exceptions have, however, to a very large extent been *obiter dicta* statements. In spite of this, the courts, and notably the Supreme Courts, have on a number of occasions - in particular within the field of criminal procedure - in substance and, in the most recent case-law also in form or explicit terms, applied the Convention directly. Where there was previously a tendency only to ascertain that the domestic solution found did not violate the Convention, there is now a tendency to embark on discussions on the application of the Convention and Strasbourg case-law. Thus there can be no doubt that the Convention is an international instrument with considerable and substantial force also on the domestic level. However, the number of reported cases in which the Convention has been referred to is in absolute terms low.

With the exception of three *Swedish* judgments¹ and one *Danish* judgment² (see *supra* section 6.2) there is, generally speaking, a firm practice of paying more and more attention to the Convention in domestic legal decisions in the highest instances. Thus the cases in which most significance has been ascribed to the Convention appear from 1988 onwards. The strength of this practice is thrown into relief if one compares it with the *English*, and to some extent also with the *Italian*, practice of the application of the Convention.

It would previously, however, have been desirable that considerations as to the relationship between the Convention and domestic law, which in the individual cases undoubtedly underlie the assumption that domestic law conforms with the Convention, had been expressed more clearly in *Danish* and *Swedish* judgments. This lack of explicit discussion of the position of the Convention in domestic law seems to have caused some doubt as to the domestic fulfillment of the obligations under the Convention. However, the

¹ AD 1972 No. 5, NJA 1973.423 and RÅ 1974.121.

² UfR 1986.898.

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most recent case-law indicates an emerging change in the courts' position in this respect. This critique does not apply to the same extent to the *Norwegian* case-law in which the relationship between the Convention and domestic law has usually been discussed more expressly.

English courts, on the other hand, have been more willing to establish that domestic law conflicts with the Convention. In the case of a conflict between the Convention and a domestic statutory provision the *English* courts have in accordance with the constitutional point of departure not hesitated to state that domestic law should prevail (see *supra* section 11.3.1). Furthermore, the courts have, so far, not had the possibility to rule on the question whether the Convention, as the expression of principles of customary international law, is a part of the common law; whereas the available case-law suggests that the Convention in certain circumstances may be considered part as the common law in the form of *public policy* (see *supra* section 11.3.5). On the other hand, the relatively frequent use of the principle of interpretative presumption (see *infra* section 14.4) have enabled the courts to avoid the violation of *Britain's* obligations under the Convention. However, the very fact that case-law concerning the Convention is quite rare, even in comparison with the *Scandinavian* countries, as well as the fact that this case-law is far from consistent, makes it difficult to conclude exactly what the position of the Convention is in the *United Kingdom* (see *supra* section 11.3.2).

In *Italy* the Convention has been adopted into domestic law by an implementation order [*ordine di esecuzione*] contained in an ordinary statute. Accordingly, the Convention possesses the status of an ordinary law in domestic law (see *supra* sections 12.2.1 and 12.3). However, this applies only to those provisions of the Convention which may be regarded as self-executing. *Italian* courts have stated in general terms that the provisions of Section I of the Convention are self-executing, whereas this is not the case regarding the UN-Covenant (see *supra* section 12.2.4). In case of a conflict between the Convention and other statutory provisions the principle of *lex posterior derogat legi priori*, generally speaking, applies, i.e. the Convention takes precedence over previously enacted legislation but has to yield to subsequent legislation. Since Article 10(1) of the *Italian* Constitution provides that "*Italy's* legal system conforms with the generally recognized principles of international law", it has been argued that the Convention is embraced by this provision because the Convention is no more than the

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expression of general principles of international law. The *Italian* courts have, like their *English* counterparts, rejected the idea that the Convention is merely the expression of customary international law, by which the Convention by virtue of Article 10(1) would acquire a position superior to ordinary legislation in the domestic norm-hierarchy (see *supra* section 12.2.1). In general, *Italian* courts seem primarily to have applied the Convention as an additional argument in conjunction with arguments of domestic (constitutional) law. This may be explained by the fact that the *Italian* Constitution contains a comprehensive Bill of Rights which to a large extent overlaps and in some instances goes even further than the provisions of the Convention (see *supra* section 12.3.3). Besides, like the *English* case-law, the *Italian* case-law concerning the application of Convention does not seem to be consistent.

In *Spain*, the *Tribunal Constitucional* has in accordance with Article 10(2) of the Constitution frequently applied the Convention as a means of interpretation of the rights protected in the Constitution. Thus the Convention constitutes an important part of *Spanish* constitutional law. The double incorporation has meant that no direct conflicts between domestic *Spanish* law and the Convention have arisen; such conflicts have mostly been of a more indirect nature and phrased in terms of conflicts between the legislation and the Constitution, *i.e.* as mere conflicts of domestic rules (see *supra* section 13.4). The way in which *Tribunal Constitucional* has applied the Convention appears to be very loyal and on certain occasions perhaps even too loyal (see *infra* section 14.6).

14.2. The Position of the European Convention in the Domestic Norm-Hierarchy.

In the *Scandinavian* countries and the *United Kingdom*, where the Convention does not possess the status of domestic law from a formal-theoretical point of view there is no question of the Convention having a formal position within the domestic norm-hierarchy (apart from applying the Convention as a means of interpretation (see *infra* section 14.4)). However, this may well be the case.

It is argued in this study (see *supra* section 10.2) that in *Scandinavia* the Convention is *a source of law which in principle possesses the same status as other sources of law*, with the *principle of legality* being the only restriction on the courts' power to apply the Convention. However, this res-

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triction does not really include the Convention since this latter aims at awarding individual rights rather than encroaching upon these. The consequence of this view is *not*, however, that the Convention, in the case of a conflict with domestic law, *should prevail absolutely*. Such conflict, it is submitted, must be resolved on the basis of *an overall evaluation of the facts of the case including the different sources of law*. As in other cases of conflict between, on the one hand, a statutory rule and, on the other, another source of law, it is certain that the statutory provision will carry considerable weight. But the considerations pointing in the opposite direction may carry such weight that a total evaluation makes the Convention rule prevail. In many cases this is in fact what is taking place when the courts reach the conclusion that there is no conflict between the Convention and domestic law.

Under the view presented here *the traditional concept of a domestic norm-hierarchy does not fit well into the idea of accepting international sources of law in domestic law*. Attempts to try to adapt international law in general and the Convention in particular into the domestic norm-hierarchy within a "dualist" system are doomed to fail, and it creates nothing but misconceptions (see *supra* section 10.2). The considerations which have an impact on resolving the conflicts between these different sources of law will be discussed below in section 14.4.

Although one, under the *Scandinavian* concept of a source of law (see *supra* section 2.4), could argue that the Convention is a source of law in domestic law, it is, on the basis of the available case-law, hardly possible to maintain that the Convention possesses the status of a domestic source of law in the *United Kingdom* (see *supra* section 11.3). Accordingly, no question of its position proper in the domestic norm-hierarchy arises.

In *Italy* the Convention possesses the status of an ordinary law, since it has been adopted through an ordinary law (see *supra* section 12.2.1 and 12.3), whereas in *Spain* it is situated *partly* above ordinary legislation and below the Constitution and *partly* over the Constitution in the sense that it forms an obligatory means of interpretation to the Constitution itself (see *supra* section 13.2).

On the basis of the study it may be questioned in general whether the formal position of the Convention in the domestic norm-hierarchy in itself says much about the impact of the Convention on the application of domestic

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law.³ The problems of the application of the Convention seem to lie elsewhere: notably when do the courts establish that there is a conflict between the Convention and domestic law?

14.3. Establishing a Conflict between the European Convention and Domestic Law.

As has been stated above in section 14.1, the *Scandinavian* courts have been very reluctant to recognize conflicts between the Convention and domestic law. In fact it has only been possible to find *one* reported and a few unreported judgments in which it clearly appears from the *ratio decidendi* of the judgment that domestic law, in the case of a conflict with the Convention, should prevail. By doing this, the courts have in general avoided ruling on how such conflicts should be resolved. Compared to the situation in the *United Kingdom* there are actually only a very few general statements on the relationship between the Convention and domestic law in *Scandinavian* practice. The courts' practice in this respect goes, generally speaking, far beyond what can be explained by the use of the *principle of presumption* (see *infra* section 14.4). However, there are some differences between the *Danish*, *Norwegian* and *Swedish* case-law in this respect.

In the *United Kingdom* the courts have on different occasions ruled, both in the form of *obiter dictum* and *ratio decidendi*, that in the case at issue there was a conflict between the Convention and domestic law and that the latter should prevail. However, in the most recent case-law it seems as if the *English* courts are becoming more unwilling to establish a conflict between the Convention and domestic law (see *supra* section 11.3.3).

In a "dualist" system the establishment of a conflict between the Convention and domestic law has decisive significance for the application of the Convention: if such a conflict is recognized, the courts have no choice but to let domestic law prevail. The courts' willingness to recognize such conflicts is therefore to a large extent similar to their willingness to apply the Convention. The ways in which it is generally accepted that the courts avoid establishing a conflict between the Convention and domestic law is outlined below in section 14.4, but these principles also leave ample room for the

³ Cf. Drzemczewski (1983), p. 191, who concludes: "Finally, it must again be stressed that discussion centred on the Convention's domestic status and the position of its provisions have secured for themselves in the domestic hierarchy does not necessarily in itself reflect the real standard of legal protection that a given state affords to individuals."

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courts in deciding whether or not to apply the Convention in the case at issue. It is in the latter relation in particular that there is a significant difference between the *Scandinavian* courts' and the *English* courts' application of the Convention. This difference may to some extent be explained by the fact that *Danish* and *Norwegian* courts at least are fairly familiar with exercising judicial review of the legislation. Also in these situations the courts have been extremely reluctant (in particular in *Denmark*) to overrule legislation on the grounds that it was unconstitutional. The *British* courts do not have this kind of experience, since in the *United Kingdom* Parliament is supreme thus leaving no room for judicial review of legislation.

Also in *Italy* the question of establishing a conflict between the Convention or, to be more precise, the law which has adopted the Convention and domestic law in general is gaining some importance. Since the Convention possesses the status of an ordinary statute, establishing a conflict between the Convention and a subsequently enacted statute means, as a rule, that the domestic statute prevails due to the *principle of lex posterior derogat legi priori*. *Italian* courts have on some occasions held that in the case at issue there was a conflict between the Convention and another statutory provision, but these cases have, due to the principles discussed in section 14.4, been resolved in such a way that the Convention has not been explicitly disregarded. However, one may find examples of cases in which the Convention does, in effect, seem to have been disregarded (see *supra* section 12.3.2).

Since the Convention possesses a position superior to ordinary legislation as well as being an obligatory means of interpretation to the Constitution in *Spain*, establishing a conflict between the Convention and domestic law means only that it is then expressly stated that the Convention is to prevail in such cases. Accordingly, this question does not in *Spanish* law hold any independent significance.

14.4. Methods of Resolving Conflicts between the European Convention and Domestic Law.

In both the *Scandinavian* countries as well as in *Italy* and the *United Kingdom* a presumption exists that domestic law is in accordance with international treaties. This principle is elaborated in slightly different ways in the different countries.

In *Scandinavia* there is a *principle of presumption*, according to which

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the courts are entitled to presume that domestic law is in conformity with undertaken international obligations. If in doubt about the interpretation of a domestic legal rule the courts should prefer the interpretation that will best comply with the Convention (the *rule of interpretation*). Moreover, should there be a conflict between a clear domestic provision and the Convention, the courts may, in the absence of any specific indication to the contrary, apply the domestic provision in such a way that the Convention is not violated. This is known as the *rule of presumption*: the courts should "presume" that it was not the intention of the Legislature to pass legislation contrary to undertaken international obligations. It is now recognized that both rules apply to legislation enacted previously as well as subsequently to the treaty in question (see *supra* sections 2.1 and 2.2).

It is submitted in this study that *Scandinavian* courts have gone further in their application of treaties in general and the Convention in particular than what can reasonably be explained by the *principle of presumption*. Thus it is argued that the Convention is a *source of law* in domestic law, and that conflicts between the Convention and domestic law should be resolved in the same manner as conflicts between different domestic sources of law (see *supra* section 10.2). Thus the *lex specialis principle*, the *lex posterior derogat legi priori principle* (but *not* the *lex superior principle*), the total or partial nature of the conflict, the practical and political problems involved in a breach of international law, the strength and clarity of the international rule, the strength and clarity of the domestic rule, the domestic rule's position in the domestic norm-hierarchy and the possibilities of ascertaining the Legislature's intentions are all considerations which have an impact on the resolving of conflicts between the Convention and domestic law. However, it is relatively rare to find clear statements qualifying these considerations. It is not possible, it is submitted, to resolve such conflicts on a basis which is more simple. "*Lex specialis, lex posterior and lex superior are not axioms...*" as Alf Ross has pointed out, "... but principles of relative weight, co-operating in the interpretation with other considerations - in particular with an evaluation concerning which way of achieving harmony will best agree with common sense, popular consciousness, or presumed social objectives."⁴

The *principle of interpretative presumption* according to which the courts are entitled to presume that it has not been the intention of Parliament to

⁴ Cf. Ross (1958), p. 134.

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legislate contrary to obligations deriving from concluded treaties recognized in *English* law applies only to situations in which domestic statutory law is unclear and/or ambiguous. This principle is applicable in relation to legislation both previous and subsequent to the treaty (see *supra* section 11.3.2). The principle has probably found its clearest expression in relation to the Convention. However, compared to the *principle of presumption* its scope is relatively limited insofar as it is only applicable to unclear or ambiguous domestic statutory provisions. The question of whether or not domestic law is ambiguous is therefore becoming as important as establishing whether or not there exists in the case at issue a conflict between the Convention and domestic law: an affirmative answer to either question rules out the possibility of applying the Convention.

The main principle for resolving conflicts between the Convention and domestic law in *Italy* is the *lex posterior derogat legi priori* principle, that is, the Convention takes precedence over previous legislation and has to yield to subsequently enacted legislation. However, this principle is modified by the *lex specialis* principle as well as by a *principle of presumption* which in *Italian* law applies to conflicts between adopted treaties and domestic law (see *supra* section 12.2.2). Moreover, the *Corte Costituzionale* has been very reluctant to hold that a treaty does not conform to the Constitution. Compared to the way in which the *lex specialis* principle and the *lex posterior derogat legi priori* principle have been (implicitly) applied in *Scandinavia*, the *Italian* courts seem to consider these principles as more absolute rules of interpretation leaving the interpreter with relatively little choice.

It does not appear from *Spanish* case-law that specific principles apply to the interpretation of the Convention. This is undoubtedly due to the fact that since the Convention is situated above ordinary legislation in *Spanish* law, it is so obvious to apply the *lex superior* principle that the courts do not find it worthwhile to mention it at all. ..

14.5. The European Convention and the Discretion of Administrative Authorities.

It is clearly established in *Denmark* and *Norway* that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations and, accordingly, also the Convention. In *Sweden* this is probably not the case although one may find statements which are expressive of a tendency to accept that ad-

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ministrative authorities are under such an obligation. Apart from one *Danish* decision to this effect, no case-law exists confirming this view. However, legal writers have agreed upon the existence of such an obligation, as have the official views of the *Danish* and *Norwegian* Governments (see *supra* chapter 9).

This is contrary to the situation in the *United Kingdom* where, following some attempts to establish such a duty for administrative authorities in the late seventies, it now seems that the courts do not require administrative authorities to take the Convention into account when exercising their discretionary powers (see *supra* section 11.3.2).

In *Italy* and *Spain*, where the Convention possesses the status of domestic law, administrative authorities have to include it in their exercise of discretionary powers as with other kinds of domestic law and in accordance with its position in the domestic norm-hierarchy.

14.6. The Possibility of an "In Pejus" Application of the European Convention.

The study of *Spanish* case-law has disclosed one surprising feature. Although usually very loyal in its application of the Convention, in certain situations the *Tribunal Constitucional* seems to have applied the Convention too loyally in the sense that it has applied the Convention *in pejus*, that is, lowering the standard of protection provided by the Constitution itself (see *supra* sections 13.3 and 13.4). The main reasons allowing this kind of application seem to be the following:

First, there is a tendency to apply the Convention to support *a fortiori* restrictions on fundamental rights through which an improper use of the Convention is reached.

Second, the fact that the European Court, due to its specific nature, rules more on *restrictions* than on *rights*. This simple point - what the Court thinks about the restrictions of a right is clearer than the real content of the right itself - makes it easier for the national courts to find some principles to follow when the legitimacy of a restriction is at issue. This has enabled the *Tribunal Constitucional* to apply some points of the "Strasbourg test", the extent to which a restriction is "necessary in a democratic society" being most important. But it has also enabled the Court to state indirectly that, once the Strasbourg test is passed, no further internal test is necessary.

Third, the fact that the European Court has not taken any decision yet as

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to the extent to which the *dynamic interpretation*, the *minimum standard* or the *margin of appreciation* doctrines should be applied in a concrete case. It is possible that the three principles should stay in force at the same time as different guidelines to be applied depending upon the circumstances. But, in that case, the European Court should state this expressly. Thus national courts could avoid taking as a *European standard* what is nothing but the minimum standard, and it would prevent them from using the *margin of appreciation* enjoyed by the European Court to lower their *national standard* of protection of Human rights.

Such an *in pejus* application of the Convention seems, apart from ascertaining that a solution found under domestic law does not seem to violate the provisions of the Convention, not to be possible in either *Scandinavia* or the *United Kingdom*, where it does not form part of domestic law, nor in *Italy* where it has the status of an ordinary statute. In the *United Kingdom* this can easily be explained by the fact that the Convention as such does not possess the status of domestic law. In *Italy* the Convention is inferior to the Constitution which embodies a comprehensive catalogue of rights. This fact also leaves little room for an *in pejus* application of the Convention. In *Scandinavia* this is due *partly* to the "dualist" point of departure, and *partly* to the existence of the *principle of legality* requiring statutory authorization for those acts which encroach upon the rights and obligations of the citizens.

If the Convention is incorporated into domestic law in an ordinary statute, one cannot completely exclude the possibility of applying the Convention *in pejus* also in *Danish* and *Norwegian* law. Since in these countries a large number of rights are guaranteed in the ordinary legislation rather than in the very brief Bill of Rights embodied in the Constitutions, such possibility seems only to be likely on the legislative level. To the extent rights embodied in the ordinary legislation provide a better protection than those of the Convention there is at least some possibility of an *in pejus* application of the Convention. It is probably unlikely that *Danish* and *Norwegian* courts would embark on applying the Convention in this way, but in a situation where a court is short of arguments for granting a restriction to a rights guaranteed in domestic legislation they may well do so. The *Swedish* Constitution contains a more comprehensive catalog of rights leaving less room for an *in pejus* application of the Convention.

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14.7. Overall Assessment.

As regards the style of reasoning, there are some important differences between the national courts. Thus the *Scandinavian* Supreme Courts have interpreted domestic law in accordance with the Convention without establishing a clear conflict between the Convention and domestic law, even in cases in which it was quite clear that there was such a conflict. As soon as the decision at issue touches upon the competence of the Legislature the courts use somewhat guarded terms in their decisions. Similarly, the *Italian* courts have avoided disregarding the Convention when conflicting with subsequently enacted legislation. The *Tribunal Constitucional* has, on the other hand, on a number of occasions directly overruled domestic provisions when it was not possible to reach an interpretation compatible with the Convention.

In spite of this difference in styles of reasoning and in the legal provisions governing the relationship between international treaties and domestic law, it is surprising how similar, in effect, the application of the Convention in *Scandinavia* and *Italy* and *Spain* is. This study has indeed confirmed the view held by Dr. *Andrew Z. Drzemczewski*, a specialist within this field, who has explained, that "[t]he possibility of using the Convention's provisions as persuasive sources of law, however, where otherwise there appears to exist a lacuna in domestic law, or where the courts are faced with a doubtful or uncertain point of internal law, has *self-evident advantages*" (emphasis added).⁵

14.8. Incorporation of the European Convention into Domestic Scandinavian Law?

Finally, one may ask whether or not it would really make any difference in the domestic application of the ECHR if it is incorporated into domestic law. From a *strictly legal point of view* the answer is probably a qualified *no*: it would not have any significant consequences on the practical level. Under the existing "dualist" system it is to a very large extent already possible for the courts to ascertain whether the Convention has been violated in concrete cases. This conclusion presupposes, however, that the courts follow the line set forth recently by the Supreme Courts in all three countries. Experiences (in particular in *Denmark* and *Sweden*) with judicial review of legislation do not suggest that an incorporation of the Convention will change the courts'

⁵ Cf. *Andrew Z. Drzemczewski*, op.cit., p. 191.

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attitude towards playing a more active role in the protection of fundamental rights. The same is the case with the *Italian* experiences with an incorporation of the Convention into domestic law by an ordinary statute. Needless to say that such a statute can be derogated from in subsequently passed legislation. However, as pointed out by Professor *Claus Gulmann* and the Director of the *Danish* Center of Human Rights, *Lars Adam Rehof*, one cannot exclude that incorporation of the Convention

"... will have important psychological consequences. It will open the eyes of the legal practitioners to the importance of the Convention, and for this reason, if for no other, the legal protection of the individual will be enhanced."⁶

If the Convention is incorporated into domestic law it will still be up to the Legislature to amend existing legislation whenever developments in the Strasbourg case-law give cause for doing so. This is due to the fact that the *Scandinavian* countries normally try to ensure that national legislation is as clear and unambiguous as possible. If a treaty is to be incorporated into domestic law, it is usually required that (1) the treaty provisions shall directly aim at or, according to their formulation, be applicable within the domestic law of the State and (2) the provisions of the treaty must be self-executing. The Convention does not entirely satisfy these requirements. If an incorporation of the Convention is followed by the usual practice of amending existing legislation when necessary, there would, on the other hand, not be any risks involved in such an incorporation. Thus an incorporation may have the function of a safety valve within the domestic legal order.

A delicate question would, however, arise in relation to the domestic application of Convention provisions having *Drittwirkung*: would the incorporated Convention as such satisfy the requirements of the *principle of legality*? The answer to this question is far from clear. The demand for statutory texts to be clear and unambiguous is a fundamental element of what is normally understood to be a community founded on the rule of law.

Finally, an incorporation might, although it is not very likely under normal circumstances, enable the law-enforcing authorities to apply the Convention as a means of lowering the protection provided by the ordinary legislation.

It may be concluded that there is neither much to win, nor much to loose

⁶ Cf. Claus Gulmann & Lars Adam Rehof in Rehof & Gulmann (1989), p. 3.

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by an incorporation of the Convention.

PART V

The Domestic Status of the European Convention in Scandinavia in Proceedings before the European Commission and Court

CHAPTER 15

Introductory Remarks: Delimitation of the Study

Parts III and IV of this study focused on how domestic courts regard and consider the ECHR. This part of the study concern the proceedings before the European Commission and Court of Human Rights.

The main aim of this part of the study is to present a survey (1) of the way in which the *Scandinavian* Governments argue the domestic position of the Convention before the Commission and Court, and (2) to determine whether or not there is conformity between the way in which domestic courts apply the Convention and the way in which the Commission and Court view its domestic status of the Convention. In other words, do the European Commission and Court agree that the Convention is, or may be regarded as, a source of law in domestic *Scandinavian* law? This question may have importance in contexts in which the Convention, for example, talks about a "remedy".

It should, however, be observed that in many cases the question of the position of the Convention in domestic law is not necessarily brought before the Commission and Court. In other cases it is touched upon only indirectly, through the application of the individual Articles of the Convention. Furthermore, in proceedings before the Commission and Court the domestic status of the Convention may in many instances be without significance. In this respect, Dr. *Andrew Drzemczewski* has pointed out:

"And finally, when one talks about the very important subject of incorporation, I should stress that while this is a subject worth discussing by academics, judges and practising lawyers on the *domestic* plane, it may not be that important, or even pertinent, in terms of discussions in Strasbourg.

It may seem surprising to you, but that is the situation, I believe, in Strasbourg. I stand to be corrected by Mr Nørgaard: -the extent to which (if at all) one country has incorporated the Convention, is by and large irrelevant in discussions before the Commission; or if discussed in the course of the deliberations, it is not considered a subject of major importance. The idea and the basic premise is that the defendant country must comply with the guarantees provided in the Convention. That is the guts of the international system established in Strasbourg."¹

¹ Cf. Andrew Drzemczewski: *The Council of Europe's Position*, in Mikkelsen (1989), pp. 24 f.

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The attitude of the Commission and Court in this respect may be explained by the fact that they consider domestic law to be taken as a whole. In other words, it has only little significance whether or not the Convention is a source of law in domestic law or has some formal rank within the domestic norm-hierarchy. What is of importance for the Commission and Court is only the question of whether or not a State complies with the requirements of the Convention. The reasons for non-compliance with the Convention are of minor, if any, importance.

Moreover, it should also be noted that the domestic cases in which the Convention has been ascribed most significance are very recent, and for this very reason have not yet been referred to in proceedings before the Commission and Court. Consequently, there is a "built-in" delay in the Commission and Court's evaluation of the domestic position of the Convention. This delay does not mean, however, that it is of no practical value to study the Commission and Court's evaluation of the domestic position of the Convention. In many cases, in fact, it is, on the basis of the Commission and Court's rulings on this point, compared with more recent developments in domestic law, possible to predict, with a high degree of probability, the outcome of future cases regarding the questions at issue. The important point in this respect is to keep the time factor in mind.

Thus, the problems raised in this context are in their very character somewhat abstract. Nevertheless, an analysis from this angle may undoubtedly provide some interesting material which may throw light over the application of the Convention in domestic law in the broadest sense. Moreover, so far such analysis has not been carried out in *Scandinavia*.

In order to approach the topic from a more practical point of view, the questions posed above will be discussed on two different levels.

First, the extent to which the Governments have pleaded on the general domestic status of the Convention will be examined (chapter 16). Such questions on the general status of the Convention in domestic law seem to have been raised primarily in connection with argumentation relating to judicial review of administrative action and to questions of domestic sources of law. Second, the way in which the Governments have argued in questions posed by Article 26 (chapter 17) and Article 13 (chapter 18) of the Convention in relation to the exhaustion of domestic remedies and the existence of an effective remedy before a national authority will be examined and discussed. As regards Article 26, this part of the study will to a large extent

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discuss which domestic remedies need to be exhausted before an application may be admitted by the Commission. Since Article 13 is frequently absorbed into Articles 6(1) and 5(4), disputes about these Articles will also be included in the discussion. On both levels the study will analyze both the parties, with emphasis on the Governments' submissions, and the Commission and Court's positions on the question at issue. Finally, the conclusions to chapters 16-18 will be drawn (chapter 19).

The exposition is made in such way that, apart from the specific relation to the domestic position of the Convention, chapters 17 and 18 are also to a large extent a discussion of the application of Articles 26 and 13 of the Convention with special regard to *Scandinavian* law. This is due to the fact that in relation to the application of these Articles the question of the domestic position of the Convention is only rarely discussed explicitly, whereas it is possible to find implications touching upon the question under examination here. These chapters give the answer to, for example, which domestic remedies are effective and need to be exhausted; which *Scandinavian* judicial bodies are independent and impartial tribunals etc.

This part of the study is based on all *published decisions* from both the European Commission² and Court³ of Human Rights concerning the

² Cf. Applications Nos. (* signifies that the decision is a decision on the admissibility): *343/57; *434/58, X v. Sweden; *867/60, X v. Norway; *911/60, X v. Sweden; *931/60, X v. Norway; *1329/62, X v. Denmark; *1468/62, X v. Norway; *1739/62, X v. Sweden; 1855/63, X v. Denmark; *2002/63, X v. Norway; 2095/63, X v. *inter alia* Sweden; 2358/64, X v. Sweden; 2369/64, X v. Norway; 2385/64, X v. Norway; 2518/65, X v. Denmark; 2792/66, X v. Norway; *3071/67, X v. Sweden; *3444/67, X v. Norway; *3788/68, X v. Sweden; *3893/68, X v. Sweden; *3916/69, X v. Sweden; *3934/69, X v. Sweden; *4210/69, X v. Norway; *4279/69, X v. Norway; *4311/69, X v. Denmark; *4475/70, Svenska Lotsförbundet v. Sweden; *4733/71, X v. Sweden; *4764/71, X v. Denmark; *5132/71, X v. Denmark; *5258/71, X v. Denmark; *5486/72, X v. Sweden; *5525/72, X v. Sweden; *5589/82, Folke Schmidt and Hans Dahlström v. Sweden; *5614/72, Svenska Lokmannaförbundet v. Sweden; *5923/72, X v. Norway; *6094/73, Association X v. Sweden; 6776/74, X v. Sweden; *6853/74, 40 mothers v. Sweden; *6854/74, X v. Denmark; *6907/75, X v. Denmark; *6930/74, X v. Norway; *7011/75, Henning Becker v. Denmark; *7151/75 and 7152/75, Sporrøng and Lönnroth v. Sweden; 7237/75, X v. Denmark; *7374/76, X v. Denmark; *7376/76, X and Y v. Sweden; *7463/76, X v. Denmark; *7565/76, Conscientious Objectors v. Denmark; *7639/76, X v. Denmark; *7658/76, X v. Denmark; *7805/77, Church of Scientology v. Sweden; *7911/77, X v. Sweden; *7945/77, X v. Norway; *7973/77, X v. Sweden; *8045/77, X v. Sweden; *8282/78, Church of Scientology et alii v. Sweden; *8395/78, X v. Denmark; 8588/79 and 8589/79, L. Bramelid and A.M. Malmström v. Sweden; *8777/79, Per Krohn Rasmussen v. Denmark; *8811/79, Seven individuals v. Sweden; *8828/79, X v. Denmark; *9017/80, McGoff v. Sweden; *9203/80, X v. Denmark; *9248/81, Torsten Leander v. Sweden; *9278/81 and 9415/81, G and E v. Norway; *9297/81, X Association v. Sweden; *9330/81, Abdulmassih Bulus et alii v. Sweden; 9330/81, Abdulmassih Bulus v. Sweden; *9401/81, X v. Norway; *9707/82, X v. Sweden; *9893/82, Frank Lysbro Pedersen v. Denmark; *9959/82 and 10357/83, 19 Chilean Nationals and S Association v. Sweden; 9974/82, X v. Denmark; 10031/82, A v. Sweden; *10141/82, L v. Sweden; *10144/82, Association K v. Sweden;

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Scandinavian countries as well as a number of recent unpublished decisions from the Commission.⁴ Emphasis will, however, as far as possible, be put on the Court's judgments as well as on the Commission's decisions on the admissibility of the applications. As regards legal literature on the application and interpretation of the Convention in general, references are only made to a few selected standard works. Since this part of the study takes a special approach to the application of the Convention, it has not been deemed necessary to make an in-depth analysis of the general application of the different provisions of the Convention.

10230/82, X v. Sweden; *10263/83, R v. Denmark; *10326/83, R v. Denmark; *10371/83, T. Ruth v. Sweden; *10378/87, K v. Denmark; *10410/83, N v. Sweden; *10426/83, B. Pudas v. Sweden; *10473/83, T. Lundvall v. Sweden; *10476/83, W, K and L v. Sweden; *10486/83, Hauschildt v. Denmark; *10515/83, M v. Sweden; *10537/83, V. Uskela v. Sweden; *10554/83, E. Aminoff v. Sweden; *10563/83, J. Ekbatani v. Sweden; *10600/83, J. Johansen v. Norway; *10653/83, S v. Sweden; *10671/83, T v. Sweden; *10723/83, Vidén v. Sweden; *10729/83, H v. Sweden; *10801/84, L v. Sweden; *10873/84, Tre Traktörer AB v. Sweden; *10877/84, M. Vallén v. Sweden; *10878/84, B. Jacobsson v. Sweden; *10911/84, Lundqvist v. Sweden; *11036/84, Svenska Managementgruppen v. Sweden; *11045/84, B.A. Knudsen v. Norway; *11122/84, V. Welter v. Sweden; *11219/84, John Ib Nielsen Kurup v. Denmark; *11532/85, Hammerdahls Stormarknad AB v. Sweden; *11628/85, Linde v. Sweden; 11655/85, H. Glazewska v. Sweden; and *11776/85, Ulf Andersson and Monica Kullman v. Sweden.

³ Cf. Eur. Court H.R., Series A, Vol. 20, *Swedish Engine Drivers' Union*; Vol. 21, *Case of Schmidt and Dahlström*; Vol. 23, *Case of Kjeldsen, Busk Madsen and Pedersen*; Vol. 52, *Sporrong and Lönnroth Case*; Vol. 83 *Skoogström Case*; Vol. 87, *Rasmussen Case*; Vol. 116, *Leander Case*; Vol. 125, (A) *Bodén Case*, (B) *Pudas Case*; Vol. 130, *Olsson Case*; Vol. 134, *Ekbatani Case*; Vol. 144, *Nielsen Case*; Vol. 149, *Barfod Case*; Vol. 154, *Hauschildt Case*; - Vol. 155, *Langborger Case*; Vol. 156, *Eriksson Case*; Vol. 159, *Tre Traktörer AB Case*; Vol. 163, *Allan Jacobsson Case*; and Vol. 181, *Case of E. v. Norway*.

⁴ Cf. Applications Nos. 5095/71 *Kjeldsen v. Denmark*; 7151/75 and 7152/75, *Sporrong and Lönnroth v. Sweden*; 10465/83, *Stig and Gun Olsson v. Sweden*; 10537/83, *V. Eskela v. Sweden*; 10554/83, *Eva Aminoff v. Sweden*; 10563/83, *John Ekbatani v. Sweden*; 10801/84, *L. v. Sweden*; 10842/84, *Allan Jacobsson v. Sweden*; 10873/84, *Tre Traktörer AB v. Sweden*; 10929/84, *John Nielsen v. Denmark*; 10930/84, *Gunner Bodén v. Sweden*; 11179/84, *Langborger v. Sweden*; *11295/84, *Frede Schmidt v. Denmark*; 11309/84, *Mats Jacobsson v. Sweden*; 11373/85, *Cécilia and Lisa Eriksson v. Sweden*; *11464/85, *Max von Sydow v. Sweden*; 11508/85, *B v. Denmark*; 11533/85, *Ingrid Jordebo Foundation of Christian Schools v. Sweden*; 11540/85, *Haim Karni v. Sweden*; 11581/85, *Peter Darby v. Sweden*; 11701/85, *E v. Norway*; *11704/85, *Eva Krol v. Sweden*; 11855/85, *Gösta Håkansson and Sune Stureson v. Sweden*; 12213/86, *Jon Axelsson et alii v. Sweden*; 12258/86, *The Estates of Mr and Ms and their Heirs and Children v. Sweden*; 12570/86, *Martin Denez v. Sweden*; 12782/87, *Erik Karlsson v. Sweden*; and *12867/87 and 14073/88, *Owe Skoogström (II and III) v. Sweden*.

CHAPTER 16

The General Position of the European Convention in Scandinavian Law in Proceedings before the European Commission and Court

As pointed out in chapter 15, it does not happen very frequently that the issue of the general domestic position of the Convention is put into question in proceedings before the European Commission and Court. The few cases which exist are, however, very interesting as to both the governments' submissions, and the Commission's and Court's evaluation of the Convention as a source of law in domestic *Scandinavian* law. In some cases it is doubtful whether the submissions of the parties concern the general position of the Convention in domestic law, or whether they concern questions as to which domestic remedies are effective and need to be exhausted before a complaint may be admitted. In the latter cases the decision is discussed in relation to the individual Article 26 of the Convention in chapter 17, rather than here in order to give the discussion some structure.

The cases in which the general domestic position of the Convention has been discussed before the Commission and Court are particularly interesting regarding the governments' argumentation because they represent, albeit in the form of submissions of one of the parties to the proceedings at issue, represent a kind of official national view on the domestic status of the Convention. If the Respondent Government's submissions do not reflect the domestic position of the Convention properly, it may face severe criticism within the domestic legal community and, consequently, it may be presumed, from public opinion. This applies in particular within a field such as human rights. This probably leaves the Government only a certain margin within which it can plead the case.

First, it should be pointed out that the Convention itself does not require that its provisions be incorporated into domestic law. No such requirement appears to follow from the text of the Convention, although the provisions in Articles 5(5) and 13 might suggest so, neither do such requirements follow

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from the *travaux préparatoires*.¹ Furthermore, first the Court and subsequently the Commission have in, *inter alia*, two cases directed against *Sweden*, confirmed this view.

In the *Swedish Engine Drivers' Union Case* the applicants submitted before the Commission that in AD 1972 No. 5 (see *supra* section 6.2) the Collective Bargaining Office stated before the Labour Court that the Convention could not be invoked before *Swedish* courts as it was not part of domestic *Swedish* law. The State had thus failed to conform with its obligation under the Convention and to incorporate it so as to allow *Swedish* subjects to refer to the Convention to support their rights. This situation is not, it was submitted, in conformity with Article 13 of the Convention.²

Since the Commission had found no violation of any of the Articles of the Convention, it concluded that Article 13 had not been violated without ruling on whether Article 13 in general requires that the Contracting States incorporate the Convention as such into their domestic law.³

The Court, on the other hand, went into the discussion of whether it could be deduced from the Convention that its Articles in Section I should be incorporated into domestic law and stated that "... in addition, neither Article 13, nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention."⁴

In the proceedings on the admissibility in the more recent Application No. 10873/84,⁵ the *Swedish* Government seemed to have been more on the offensive and argued strongly that the fact that a State is a party to the Convention does not automatically mean that the authorities of that State are bound to found their decisions explicitly or directly on the Convention. The latter instrument is binding only on the *Swedish* Legislature and requires that

¹ See Drzemczewski (1983), pp. 48 ff., at p. 53, where it is concluded that an "... apparent lacuna exists in the *travaux préparatoires* since this particular point does not seem to have been adequately (if at all) debated." See also Bernhard & Lehmann (1985), p. 25; Danelius (1989), p. 66; and Fawcett (1987), p. 4.

² Cf. Eur. Court H.R., *Swedish Engine Drivers' Union Case*, Series B, Vol. 18 (1977), Report of the Commission, para. 53.

³ *Ibid.*, at para. 98. As will be seen in section *infra* 17.2.1, this is not a valid interpretation of Article 13 any more.

⁴ *Ibid.*, Series A, Vol. 20 (1976), para. 50.

⁵ Cf. 44 D.R., pp. 246 ff.

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national rules are in conformity with it. Thus, the fact that an authority has not examined or invoked the Convention in a particular case or decision cannot be regarded as a separate question before the Commission. The question to be examined was only whether an authority's application of the *Swedish* rules constituted a violation of the Convention.⁶

The Commission agreed with the Government in this respect and ruled that the

"... Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the provisions of the Convention [...] The Commission also recalls the following statement made by the Court (see Eur. Court H.R., judgment of 18.1 78, *Case of Ireland v. the United Kingdom*, para. 239):

"By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Art. 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States. This intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law."

It follows that *Sweden* is not obliged to transform the text of the Convention into *Swedish* law."⁷

Since the *Swedish Engine Drivers' Union Case* was the first case in which the Court ruled on the question of incorporation of the Convention, it may be assumed that the argumentation put forward by the *Swedish* Government had at least some impact on the Court's considerations in this respect.

Leaving aside the question of a general incorporation of the Convention into domestic law, the domestic position of the Convention may be of importance in relation to a possible violation of one or more of the Articles of the Convention. The *Case of Kjeldsen, Busk Madsen and Pedersen* (see *infra* section 17.2.1) was the first case in which a *Scandinavian* Government submitted that the Convention, at least in some respects, was directly applicable in domestic law. Another very illustrative example of this may be found in the *Hauschildt Case* where the *Danish* Government argued quite strongly that the Convention was directly applicable in domestic *Danish* law.

⁶ Cf. the Report of the Commission, p. 45 (not included in the summary of the case in D.R.).

⁷ Cf. 44 D.R., pp. 253 f.

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Thus it was stated:

"It is the opinion of the Government of *Denmark* that, under the provisions of section 60, cf. section 62, of the *Danish* Administration of Justice Act [quoted *supra* in section 8.4], the applicant was in fact offered a real opportunity to have judicial review of the question as to whether, under the provisions of the *Danish* Administration of Justice Act and under Article 6 of the Convention, a judge having ordered detention on remand of a person accused of or charged with an offence shall be debarred from taking part in the subsequent trial and decision-making on the question of guilt."⁸

The Government then referred to UfR 1987.307 (see *supra* section 8.4) as an example of a case in which an appeal instance had in fact exercised judicial review of the question of whether the fact that a judge had ordered detention on remand *per se* should disqualify him from subsequently hearing the case as a trial judge. However, in this case the *Højesteret* did not find that a judge who had ordered detention on remand *per se* should be considered disqualified from hearing the case as trial judge. But, in the Government's view, this was not the decisive point, since the *Højesteret* had in fact reviewed the question put before it.

This made the Court ask whether the said statement implied that, in the Government's view, Article 6 of the Convention was directly applicable in *Denmark*. The Government answered in the following way:

"[I]n their memorial the Government state that the courts make a real judicial review of the compatibility of the *Danish* Administration of Justice Act with the European Convention on Human Rights. This implies that treaties entered into by *Denmark* are a *source of law* in *Danish* courts. Therefore, the European Convention on Human Rights is relied upon by *Danish* courts particularly in the field of criminal law procedure. In cases of doubt the courts will apply the direct test whether a decision taken, for instance, under the *Danish* Administration of Justice Act, is contrary to any provision of the Convention. In other words, the courts apply the European Convention on Human Rights as a *true source of law* when they determine the concrete legal contents of their decisions. Reference can be made to various decisions in... [UfR]... 1985.1080, 1987.440 and 1987.307. I should like to refer to one case from 1987 where the Supreme Court decided whether a refusal of a counsel for the defence chosen by the accused was contrary to Article 6 of the Convention. In this respect, the European Convention was taken into account and is, though not formally incorporated into *Danish* law, a determining factor in the interpretation of the *Danish* rules of law, including the relevant sections of the Administration of Justice Act in

⁸ Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), Memorial of the Government of Denmark (Cour (88) 70).

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this case" (emphasis added).⁹

This was, however, not enough to persuade the majority of the Court that the application be declared inadmissible for failure to exhaust domestic remedies in accordance with Article 26 of the Convention.¹⁰ The Court found that the *Danish* Government "... had not alleged ascertainable facts - such as previous case-law or doctrine - which should have caused counsel for the defence to have doubts concerning his interpretation of the [Administration of Justice] Act."¹¹ On the contrary, the Government did not deny that for several years nobody had ever challenged a trial judge on the ground of his having made pre-trial decision in the case. The latter fact suggested general acceptance of the system, or at least of the interpretation relied on by counsel for the defence. Furthermore, since UfR 1987.307 was delivered subsequent to the domestic proceedings in the *Hauschildt Case*, neither the City Court Judge nor the President of the High Court thought it necessary to take any initiative themselves in relation to the question of their possible disqualification; the Court found that the Government had not shown "... that there was available under *Danish* law at the relevant time [that is 1981-1983] an effective remedy to which the applicant could be expected to have resorted".¹² The

⁹ Ibid., Verbatim Record (Cour/Misc (88) 239), pp. 41 f.

¹⁰ Similarly, in its decision on the admissibility the Commission had found that, since the applicant "... could not have pointed at any breach of *Danish* law when complaining about this situation", no effective remedy was available to him, cf. 49 D.R., p. 104.

¹¹ Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 41.

¹² Ibid., para. 42. However, a minority of the Court, consisting of Judges Thór Vilhjalms-son, Palm and Gomard (from Iceland, Sweden and Denmark respectively), found that "Mr Hauschildt and his counsel decided at the relevant time against raising the question of impartiality." Mr Hauschildt's present application was therefore, in the view of those Judges, inadmissible because of failure to exhaust domestic remedies. Judge Ryssdal (from Norway), in a separate opinion, concurred with the majority of the Court on this point.

It is interesting that three out of four *Nordic* judges found that the applicant had not exhausted domestic remedies in the case. Besides, on the merits of the case the same judges dissented. This suggests that there is a substantial difference in points of view between *Nordic* lawyers and lawyers from the rest of the Member States of the Council of Europe. Eva Smith: *Menneskerettighedskonventionerne og de nordiske retsplejeordninger*, [The Human Rights Conventions and the Nordic Systems of Administration of Justice], The Proceedings of the 32nd Nordic Meetings of Lawyers, Reykjavík (1990), Vol. 1, pp. 11 ff., at pp. 20 f., goes as far as classifying the judgment as "... an error of judgment which is caused by the fact that the judges of the European Court of Human Rights do not have a sufficient understanding of those principles on which the systems of administration of justice of the individual countries are founded." [... en forkert dom, som skyldes, at EMD's dommere ikke har tilstrækkelig forståelse for de principper, de forskellige landes retsordninger bygger på].

As pointed out by Søren Stenderup Jensen at the Meeting, Ibid., Vol. 2, [forthcoming], one should probably be careful of not overstating the far-reaching consequences for the

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same is probably true regarding the Government's submissions on the general domestic status of the Convention in *Danish* law; in its judgment the Court did not comment on this submission.

On the basis of more recent *Danish* case-law regarding the domestic application of the Convention - even if one excludes the *Højesteret's* decisions in UfR 1990.13 and UfR 1990.181 which both refer to the *Hauschildt Case* - it seems to be doubtful whether the Court, on the basis of the same argumentation, would in future cases be able to uphold this view on the position of the Convention in domestic *Danish* law. With its emphasis on "at the relevant time" the Court seems to have indicated that it may be prepared to change its view on this point, provided relevant case-law and doctrine are available to it. Now it is in fact possible to refer to domestic *Danish* case-law and doctrine in which the Convention is treated as a source of law (see *supra* chapter 8).

That the Court is prepared to accept that the Convention may be a source of law in domestic law in a "dualist" system follows from the recent judgment of 29 August 1990 in the *Case of E v. Norway*. In the case the Commission had found that the combination of the *Norwegian* courts' power to review administrative decisions under the unwritten constitutional principle of judicial review of administrative action and, as alleged by the *Norwegian* Government, the status of the Convention as a source of law in domestic law did not fulfil the requirements set forth in Article 5(4) of the Convention that a person deprived of his liberty shall be "... entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court" (see *infra* section 18.4).

In the proceedings before the Court, the *Norwegian* Government submitted even more strongly that the Convention is a source of law in domestic *Norwegian* law which the courts, when exercising judicial review under the said principle of judicial review of administrative action, would have to take into account:

"These arguments should be seen in the light of the Convention's status as a source of law in the *Norwegian* legal system. The existence of Article 5(4), as interpreted

Scandinavian procedural systems deriving from this decision, since in para. 50(3) of the judgment the Court generally approved the *Danish* criminal procedural system on this point (see *supra* section 8.4). However, this does not exclude, as rightly pointed out by *Eva Smith*, that the judgment at any rate may have some unfortunate effects on the *Scandinavian* procedural systems which in the end may turn out to be disadvantageous for defendants.

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by the Court, is in fact in itself an additional argument for concluding that the domestic courts have full competence to review the merits of administrative decisions under section 39" (emphasis added).¹³

The Government then made references to NRt. 1984.1175, which was rendered half a year before the applicant lodged his application with the Commission, and NRt. 1989.1327 (see *supra* section 8.2) and concluded that "... it follows that the scope of domestic court control complies with the requirements of the Convention. Even if one were to doubt this when reading the *Norwegian* sources only, one also has to take into account the traditional principle of presumption just mentioned and the relevant case-law thereon..."¹⁴ Accordingly, "[n]either the wording of [section] 39 of the Penal Code nor any other legislative enactment would seem to prevent a review consistent with the requirements of Article 5 § 4 of the Convention, as interpreted by the European Court of Human Rights."¹⁵

This argumentation proved to be more successful before the Court than it had been before the Commission.

Under the heading "Relevant domestic law and practice" the Court first outlined the case-law - including a number of rulings rendered after the public hearing before the Court in the case was held - of the *Høyesterett* regarding the status of the Convention in domestic *Norwegian* law.¹⁶ In particular, the Court cited extensive parts of the judgments in NRt. 1982.241, NRt. 1984.1175 and NRt. 1989.1327.

As will be seen in section 18.4, where the aspects of the decision specifically related to Article 5(4) are discussed, the Court found that the combination of the unwritten constitutional principle of administrative action and the status of the Convention as a source of law in domestic law fulfilled the requirements set forth in Article 5(4) of the Convention. The Court's reasoning concerned primarily the possibility as such of having a judicial review of the decision of the Ministry of Justice to detain the applicant under

¹³ Cf. Eur. Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990), Verbatim Record (Cour/Misc (90) 24), pp. 39 f.

¹⁴ *Ibid.*, at p. 41.

¹⁵ *Ibid.*, Judgment, para. 59.

¹⁶ Namely NRt. 1961.1350, NRt. 1966.476, NRt. 1974.935, NRt. 1982.241, NRt. 1984.1175, NRt. 1987.612, NRt. 1989.1327 and rulings of 16 and 29 March 1989 [to be reported in NRt.] (see *supra* sections 6.3 and 8.2.2).

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section 39(1)(e) or (f) of the Penal Code. However, by explicitly mentioning that the *Norwegian* "... Government further emphasized that there was general agreement that the *Norwegian* courts would follow the "principle of presumption", that is to say, that domestic provisions have to be interpreted to the extent possible in such way as to be in conformity with treaties binding on *Norway*" within the grounds of judgment, the Court indicated that it found that the case-law concerning the application of the Convention in *Norwegian* law referred to by the Government provided a sufficient basis for a broad review of the Ministry's decision under the unwritten constitutional principle. This basis was so strong that the fact that the Government was unable to refer to any decisions by the *Høyesterett* to the effect that an administrative decision taken under section 39 of the Penal Code can be overruled in judicial proceedings, was without decisive impact on the Court:

"Nevertheless, on the basis of the foregoing examination of the *Norwegian* system, the Court is satisfied that the available judicial review was wide enough to bear on those conditions which, under the Convention, were essential for the lawful detention of the applicant pursuant to Article 39 § 1 of the Penal Code."¹⁷

Against this background this decision must be regarded as a recognition of the status of the Convention as a source of law in domestic *Norwegian* law. In comparison with the *Hauschildt Case* the fact that the *Norwegian* Government was able to refer to a large number of cases in which the Supreme Court had expressly referred to and/or discussed the Convention seems to have been decisive for the Court on this point. In the *Hauschildt Case* the *Danish* Government was only able to refer to three cases concerning the domestic application of the Convention, whereas in this case the *Norwegian* Government was able to refer to nine such cases. Moreover, in the *Norwegian* cases the *Høyesterett* had discussed the relationship between the Convention and domestic law more explicitly and more comprehensively than was the case in the *Danish* judgments. The existence of this case-law has probably been decisive for the Court.

Although the Court in the *De Wilde, Ooms and Versyp Case* has stated that "... the judicial proceedings referred to in Article 5(4) need not, it is true, always be attended by the same guarantees as those required under Article

¹⁷ *Ibid.*, at para. 60(5).

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6(1) for civil or criminal litigation",¹⁸ this decision will probably also have implications for the application of Article 6(1) in *Denmark* and *Norway* where one finds this combination of a general rule of judicial review of administrative action and the status of the Convention as a source of law in domestic law.

¹⁸ Cf. Eur. Court H.R., *De Wilde, Ooms and Versyp Case*, Series A, Vol. 12 (1971), para. 78.

CHAPTER 17

Article 26 of the European Convention in Proceedings before the European Commission and Court

17.1. Points at Issue.

Article 26 of the Convention reads as follows:

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

In Application No. 343/57 (see *infra* section 18.2.3) the Commission stressed the principle of State responsibility embodied in the rule:

"... the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to be done to the individual."¹

The application of Article 26 raises questions as to (1) what kinds of remedies come under the rule; (2) the effectiveness of the remedies; and (3) special circumstances limiting the application of the rule.²

Without going into details, the application of Article 26 may be described briefly as follows: a remedy may be afforded by judicial process or by administrative authority, whereas an act of grace or discretion are not remedies that must be exhausted under Article 26.³ *I.e.* a petition for the reopening of the case of which the applicant complains is normally not required since this kind of petition is granted only as a matter of discretion.⁴ Moreover, the remedy must have the finality of decision to meet the requirements of Article 26. However, this Article does not require that a complaint

¹ Cf. 2 Yearbook 1958-59, pp. 412 ff., pp. 438.

² Cf. Fawcett (1987), p. 356.

³ *Ibid.*, at p. 357; and Jacobs (1975), p. 238.

⁴ Cf. Bernhard & Lehmann (1985), pp. 36 ff.; Danelius (1989), p. 52; and Jacobs (1975), p. 238.

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be presented to the national authorities in terms of precise reference to the Convention or to domestic law, but that it be presented *in substance* to both facts and law. Any doubt that may exist as to the prospects of success of a particular remedy does not relieve the applicant of the obligation to exhaust that remedy, it being left to domestic courts to resolve. On the other hand, if the case-law of the appeal instances shows that an appeal has no reasonable prospect of success, the applicant is not obliged to lodge an appeal.⁵ This exception to the main rule is, however, usually interpreted narrowly. As will be seen, the Commission has on some occasions let special circumstances influence the application of Article 26.

If there is no remedy against a decision, the six months period begins from the date of the decision complained of.⁶ However, this applies - as the Commission held in the *Sporrong and Lönnroth Case*⁷ - only to cases where the complaint is directed against a decision as such or another particular event, and not where the grievances come about more gradually, on account of the passing of time from the accumulation of renewed delays of administrative measures.

The application of Article 26 gives the opportunity of illustrating how the governments argue before the Commission. Although the rule does not require that the complaint be presented before the national authority with specific reference to the Convention, it happens frequently that the application of the Convention in domestic law is at stake. The Commission's direct evaluation of the Government's argumentation in this respect, or more indirect evaluations implied in statements concerning which remedies are effective, give an idea of how the Commission views the domestic status of the Convention. This chapter therefore provides an outline of the domestic remedies that need to be exhausted before a complaint may be declared admissible.

17.2. The Different Remedies which need to be exhausted.

17.2.1. Judicial Review of Administrative Action.

⁵ Cf. Bernhard & Lehmann (1985), p. 36; Fawcett (1987), p. 357; Erik Friberg: *Europeiska konventionen om mänskliga rättigheter*, [The European Convention of Human Rights], Lund (1984), p. 32; and Jacobs (1975), p. 239.

⁶ See for example Applications Nos. 9959/82 and 10367/83, cf. 37 D.R., p. 89.

⁷ Cf. Applications Nos. 7151/75 and 7152/75, cf. 15 D.R., pp. 20 f. See also Application No. 10537/83, cf. 44 D.R., p. 105.

Judicial Review of Administrative Action

The leading case concerning the question of whether or not proceedings instituted under *Article 63 of the Danish Constitution* were a remedy which needed to be exhausted is the *Case of Kjeldsen, Busk Madsen and Pedersen*.⁸ In the case the *Danish* Government submitted that the applicant had made no attempt to bring their complaint before the courts. The Government first explained that the *rule of interpretation* and the *rule of presumption* (see *supra* section 2.2) were considered as an integrated part of domestic *Danish* law. The Government then referred to Article 63 of the *Danish* Constitution which authorizes the courts to "... decide any question bearing upon the scope of the authority of the administration." Following these rules, the applicants could have pleaded before *Danish* courts that the provisions on compulsory integrated sex education were at variance with Article 2 of Protocol No. 1. Not only had academic writers maintained that it was possible to raise the Convention before *Danish* courts but the *Københavns Byret* had specifically referred to Article 6(3)(e) of the Convention in a case where it had ordered that the cost of interpretation should be paid out of public funds and not by the defendant who was a foreigner.⁹ As a further example, the Government referred to the discretionary powers given to the Ministry of Justice, under the previous Act on Alien's Entry and Residence in Denmark, to take decisions on the expulsion of aliens. In exercising these powers the Ministry of Justice had taken into account the right to respect of family life as guaranteed under Article 8 of the Convention (see above chapter 8).¹⁰

The Commission partly concurred with the Government stating "... that, insofar as the present application relates to the directives issued by the Ministry of Education and other administrative measures taken by the *Danish* authorities regarding the manner in which the sex education referred to in the 1970 Act should be carried out, it cannot be said that the remedy indicated by the respondent Government would clearly have been without any prospect of success."¹¹

However, as regards the School Act of 1970 which laid down the principle of compulsory sex education and authorized the Minister of

⁸ Cf. Eur. Court H.R., *Case of Kjeldsen, Busk Madsen and Pedersen*, Series A, Vol. 23 (1976).

⁹ Judgment of 25 April 1966, Case No. 21472/1965, I (see *supra* section 8.2.2).

¹⁰ Cf. Eur. Court H.R., *Case of Kjeldsen, Busk Madsen and Pedersen*, Series B, Vol. 21 (1978), Report of the Commission, pp. 76 f.

¹¹ *Ibid.*, at p. 81.

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Education to issue regulations as how this instruction should be given, the Commission held:

"The applicants have asserted that no proceedings could be taken under Article 63 of the *Danish* Constitution against an Act of Parliament. The respondent Government have not contested this assertion and have not suggested that any other specific remedy might be available to the applicants insofar as the provisions of the 1970 Act are concerned. The Commission therefore concludes that there was no effective remedy available to the applicants with regard to the principle of compulsory sex education embodied in the Act. It follows that, in this respect, the application cannot be rejected as inadmissible under Article 26 of the Convention."¹²

Dr. *Niels Eilschou Holm*, who was adviser to the Government in the proceedings, has pointed out that the Commission's statement on this point is to some extent due to a misunderstanding. It is true that the Government did not dispute that Article 63 does not in general grant the courts a right to review legislation. However, in the case the Government maintained to the very end that the question of the scope of the authorization granted by the School Act of 1970, interpreted in the light of the Convention as set forth in the *rule of interpretation* and the *rule of presumption*, could be reviewed by the courts by virtue of Article 63 of the Constitution.¹³ Moreover, there exists in *Danish* law an unwritten constitutional principle according to which the courts are entitled to exercise judicial review of statutes.¹⁴

In all events the Commission accepted that Article 63 of the Constitution is an effective remedy with regard to *administratively issued regulations*.

The Commission holds the same view as regards *concrete administrative decisions*. In Application No. 6874/74 the Commission found that the applicant had failed to exhaust domestic remedies since he had not lodged an appeal against a decision taken by the local Child and Youth Welfare Board with the National Social Welfare Board as regards the merits of the decision, or instituted court proceedings under Article 63 of the Constitution as regards the legality of the decision. The Commission first referred to its decision on the admissibility in the *Case(s) of Kjeldsen, Busk Madsen and Pedersen*.

¹² *Ibid.*

¹³ Cf. *Niels Eilschou Holm: En sag for menneskerettighedsdomstolen*, [A Case before the Court of Human Rights], Copenhagen (1980), pp. 79 f.

¹⁴ See, for example, the cases in UfR 1921.148 and 153, UfR 1921.168 and 169, UfR 1921.644, UfR 1935.1, UfR 1971.299, UfR 1980.955 and UfR 1987.1. See also Germer (1988), Vol. 2, pp. 20 ff.; and Zahle (1989), Vol. 2, pp. 330 ff.

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Regarding the case at issue the Commission held "... that the applicant has failed to bring any court proceedings under Art. 63 of the *Danish* Constitution in regard to the matters of which he is now complaining."¹⁵ He could not, therefore, be considered to have exhausted the remedies available to him under *Danish* law.¹⁶

It is stated expressly in Article 63 of the *Danish* Constitution that instituting proceedings under the provision does not have any suspensive effect regarding the enforceability of the administrative decision which is challenged under the provision. This fact makes the remedy provided for in the provision less effective in relation to persons who are facing imminent deportation, expulsion, expatriation etc. One may, therefore, ask whether Article 63 is a domestic remedy which needs to be exhausted in such circumstances also. The Commission has dealt with this question on several occasions.

In Application No. 7011/75 the question at issue was whether a *possible* decision of the *Danish* Government to return a group of Vietnamese children to Vietnam would violate Article 3 of the Convention. The applicant submitted that, according to Article 63 of the *Danish* Constitution, the courts are only entitled to decide questions bearing upon the scope of the authority of the executive. In the present case the decision of the Government to return the children was final and completely discretionary. Consequently, this decision could not be subject to judicial review.¹⁷

The Government opposed this argument, stating that "... the courts were entitled to try any question pertaining to the legality of any decision of the Government on the return of the children, and also whether the decision was in conformity with the Convention." The applicant rejoined that it implied that the Convention had been incorporated into *Danish* law and therefore would be respected by the *Danish* courts. This was, however, not the case and there existed no cases decided by the *Danish* courts supporting the theory advanced by the Government.¹⁸

¹⁵ Cf. 7 D.R., pp. 81 ff., at p. 83.

¹⁶ In Application No. 7639/76 the Commission came to a similar result in a case concerning the applicant's right to access to his children of whom the mother had the custody.

¹⁷ Cf. 4 D.R., pp. 215 ff., p. 227.

¹⁸ *Ibid.*

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The Commission noted that the question at issue was whether or not Article 63 of the *Danish* Constitution offered a remedy against an order of the Government to return the children to Vietnam. The Commission recalled that in its previous decisions it had found that proceedings brought under Article 63 of the Constitution in relation to certain administrative measures would clearly not have been without any prospect of success. Then, it went on:

"However, in view of the arguments in the present case it should be pointed out that no decision with executory force has yet been taken to return the children and (even if the temporary residence permit would suffice as a basis for an action under Article 63 of the *Danish* Constitution) the Commission notes that a court action under the said provision in any event would not have suspensive effect on an order of repatriation. Consequently in this case it would not be an effective remedy within the meaning of Article 26 of the Convention and the application cannot be rejected for non-exhaustion of remedies."¹⁹

On the basis of these decisions it may be concluded that Article 63 of the *Danish* Constitution is normally an effective remedy within the meaning of Article 26 of the Convention, which needs to be exhausted. However, if the applicant is facing an imminent order to leave the country, Article 63 does not provide an effective remedy because instituting proceedings under the provision has no suspensive effect.²⁰ In the latter context it does not matter whether or not the Convention is a source of law in domestic law which may be invoked under the said Article.

In the *Case of E v. Norway*²¹ (see *supra* chapter 16) which concerned the question of whether or not proceedings instituted under the *unwritten Norwegian constitutional principle of judicial review of administrative action* fulfilled the requirement that a person deprived of his liberty shall be "... entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court" as laid down in Article 5(4) of the Convention in relation to the Department of Justice's decision to implement security measures under section 39 of the *Norwegian* Penal Code, the Government also pleaded that there had been an effective remedy available in domestic

¹⁹ Ibid., at p. 233. Similarly, in Application No. 7465/76, cf. 7 D.R., p. 154 ff., the Commission found that instituting proceedings under Article 63 of the Constitution against a decision to expel the applicant was not an effective remedy which ought to have been exhausted.

²⁰ Cf. Bernhard & Lehmann (1985), p. 38; and Fawcett (1987), p. 359.

²¹ Cf. Application No. 11701/85.

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law which the applicant had not exhausted.

The Commission noted that a dispute existed between the parties as to whether the remedy available fulfilled the requirements of Article 5(4) of the Convention. Therefore, the Commission found no reason to rely on Article 26 of the Convention, but considered the issue under Article 5(4) in the light of the submissions of the parties (see *infra* section 18.4).

17.2.2. Leave to Appeal to the Supreme Court.

In Application No. 8395/78 the Danish Government contended that the applicant had not exhausted domestic remedies since he had not applied in time to the Ministry of Justice for leave to appeal to the *Højesteret* against a decision of the High Court rejecting the applicant's request for release from isolation when detained on remand.

The Commission first noted that the applicant had no direct right prescribed by law to appeal against the decision of the High Court to the *Højesteret*. Then, it was held:

"To lodge such an appeal he had to be granted leave by the Minister of Justice, by way of exception, pursuant to the provision of Section 968, sub-section 3, cf. Section 966 of the Administration of Justice Act. Hence the Commission is of the opinion that the application to the Minister of Justice for leave to appeal to the the Supreme Court was an extraordinary remedy, but not an effective remedy as of right that the applicant had to exhaust, for the purpose of fulfilling the requirements of Article 26 of the Convention."²²

Had the applicant in fact applied for leave to appeal to the *Højesteret*, the question would have arisen whether the six months' period should be calculated from the date of the decision of the Ministry of Justice. It probably follows from the Commissions decision in Application No. 10326/83²³ (see *infra* section 17.2.3) that the decision of the Ministry of Justice should not be considered the "final decision" within the meaning of Article 26.²⁴

17.2.3. The Re-Opening of Cases.

²² Cf. 27 D.R., p. 50 ff., at p. 52.

²³ Cf. 35 DR, pp. 218 ff.

²⁴ Bernhard & Lehmann (1985), p. 38, on the contrary, assume that if an application for leave to appeal to the *Højesteret* has been lodged with the Ministry of Justice and dismissed, there must be a presumption that the six months' period should be calculated from the date of the decision of the Ministry of Justice.

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The re-opening of cases is usually a remedy which it is not necessary to exhaust in order to comply with Article 26. This is due to the fact that such a re-opening of a case is normally based exclusively on a discretion; no legal right exists in relation to the resumption of cases.

A series of decisions concerning the question whether or not *Den særlige Klageret* [the Special Court of Revision] in *Denmark* is an ordinary remedy which needs to be exhausted before lodging an application with the Commission is very illustrative of how the *Scandinavian* Governments plead cases before the Commission. Though the decisions do not in particular touch upon the domestic position of the Convention, they are nevertheless very interesting in terms of illustrating the *Danish* Government's successful attempt to make the Commission revise its own case-law.

Den særlige Klageret is a permanent court set up under section 1 a of the *Danish* Administration of Justice Act. The Court consists of three ordinary members - one Supreme Court Justice, one High Court Judge and one City Court Judge - appointed by the Queen on the recommendation of the Ministry of Justice. In matters concerning the re-opening of a criminal case, the Court is to be reinforced by the addition of two persons of whom one is to be a practising advocate appointed from four candidates proposed by the *Danish* Bar Association and the other a university teacher of jurisprudence or a jurist with a special scientific training. These two members, as well as the three ordinary members, who are appointed for a term of ten years, are eligible for re-appointment, and may not be removed from office except by a judgment of a court of law.

Sections 976 and 977 of the Administration of Justice Act lay down the grounds on which the resumption ["*genoptagelse*"] of a criminal case may be ordered at the instance respectively of the Public Prosecutor and a convicted person. The main ground for the resumption of a case is in both instances the existence of *new* evidence.

In Application No. 343/57,²⁵ the *Nielsen Case*, the *Danish* Government contended that it was the judgment of the *Højesteret* and not the decision of *Den særlige Klageret* which constituted the "final decision" within the meaning of Article 26 of the Convention.²⁶ *Den særlige Klageret*, it was

²⁵ Cf. 2 Yearbook 1958-59, pp. 412 ff.

²⁶ The case is discussed by Ole Espersen: *Nogle bemærkninger om menneskerettighedskonventionen og Bjørn Schouw Nielsen sagen*, [Some Observations on the Human

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maintained, is an extraordinary court outside the ordinary system of the *Danish* courts of law. Consequently, a petition to the Special Court is not a domestic remedy according to the generally recognized rules of international law. In particular, a petition to the Special Court cannot be described as an appeal and, with regard to the filing of petitions with the Court, the law does not impose any time limit. If the Commission were to consider that a petition to the Special Court is an extraordinary remedy, criminal cases, dating back from many years, could be submitted to the Commission by the simple expedient of first petitioning the Special Court in this respect and then applying to the Commission within six months from the date of the decision of the Special Court. This practice would in the Government's view give rise to the filing with the Special Court of many ill-founded petitions and also to the non-application to many *Danish* criminal cases of the six months time limit. A further consequence of the view that the Special Court is an ordinary remedy would be that the applicants before lodging a complaint with the Commission would have to petition the Special Court. However, this appears to be untenable because the Special Court will not normally be competent to decide whether the rights guaranteed by the Convention have been infringed. For example, complaints relating to the duration of detention or to the justification of arrest may be dealt with by the Commission but fall outside the competence of the Special Court. On the other hand, the principle function of the Special Court, namely the assessment of evidence, falls outside the competence of the Commission.²⁷

In its decision on the admissibility, the Commission first established that the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual.²⁸ Regarding the case at issue the Commission held that

Rights Convention and the Bjørn Schouw Nielsen Case], UFR 1962 B, pp. 102 ff.; and Niels Madsen: "*Hypnosemordsagen*" for den europæiske menneskerettighedskommission, [The Hypnosis Murder Case" before the European Commission of Human Rights], Juristen 1962, pp. 29 ff.

²⁷ Cf. 2 Yearbook 1958-59, pp. 431 ff.

²⁸ Ibid., at p. 438.

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"... the right to petition the Special Court of Revision for the re-opening of the proceedings and an order for a new trial must be considered as having offered to the Applicant the possibility of an effective and sufficient legal remedy with regard to some of the matters which form the subject of his complaint before the Commission; whereas, moreover, the *Danish* Administration of Justice Act has established the Special Court of Revision as a permanent court and has expressly invested it with the power to re-open the proceedings and to order a new trial in certain cases and on certain specified grounds; whereas, therefore, the right of recourse to the Special Court of Revision appears to be an integral and regular part of the *Danish* system of administration of justice in criminal cases; and whereas it follows that, *prima facie*, under the generally recognised rules of international law relating to the exhaustion of domestic remedies there does not appear to be any ground for excluding petitions to the Special Court of Revision from the remedies which must be exhausted before an international tribunal may be seized of the case."²⁹

Accordingly, the Commission held "... that, in applying the provisions of Article 26 of the Convention to the present case, the decision of *Den særlige Klageret*, and not that of the *Højesteret*, is to be regarded as the "final decision" in the case so far as concerns all those matters with respect to which the remedy before the Special Court of revision must be deemed to have offered the Applicant the possibility of an effective and sufficient means of redress."³⁰

The Commission's decision in this case appears to be incorrect because *Den særlige Klageret* only grant the resumption of a case on the basis of a discretion in the case.³¹ However, the Commission partly agreed with the *Danish* Government's contestation that those parts of the application relating to matters regarding to which *Den særlige Klageret* is not competent to give a remedy must be considered inadmissible, since with respect to those parts of the application, the final decision was rendered by the *Højesteret*. Thus the Commission held that this question is "one which has to be determined in the light of the nature and the circumstances of each particular ground of complaint."³²

In Application No. 4311/69 the *Danish* Government repeated its argumentation in the *Nielsen Case*. Moreover, the Government pointed out that when the petition was filed with the Special Court neither the decision

²⁹ Ibid., at pp. 440 ff.

³⁰ Ibid., at pp. 444.

³¹ Cf. Jacobs (1975), pp. 238 f.

³² Cf. 2 Yearbook 1958-59, p. 444.

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of the *Højesteret* nor the complaint concerning the High Court proceedings could have been made the subject of an application to the Commission; only the petition to the Special Court rendered the application to the Commission possible. In the words of the Government:

"Such a result is manifestly unreasonable. Section 977 of the Administration of Justice Act prescribes no time-limit because it is considered undesirable in *Danish* law to bar a case from being resumed if more recent circumstances give rise to strong doubts about the correctness of a judgment. But this should not preclude the considerations underlying Art. 26 from being applicable in *Denmark*" (emphasis added).³³

This use of strong language of the part of the *Danish* Government seemed to have had some effect on the Commission: the Commission was probably already on the defensive on this point, although it was not yet prepared to revise its decision in the *Nielsen Case*:

"Whereas, in making this examination, the Commission has in particular taken into account its extensive jurisprudence, subsequent to the above decision in the *Nielsen Case*, concerning the relevance, for the purpose of Art. 26, of an application for retrial made according to the laws of other Contracting Parties; whereas, in the light of this jurisprudence the Commission has considered the question whether or not to maintain the principle expressed in the *Nielsen Case* as regards recourse to the Special Court of Revision; whereas, however, in the present case, the Commission has found it undesirable to base its decision on an interpretation of Art. 26 different from the one adopted in the *Nielsen Case* and has decided, *while leaving the question open for consideration in any future case*, to pursue its examination of the present application on the basis that recourse to the Special Court, in principle, be regarded as an effective and sufficient remedy for the purpose of Art. 26 of the Convention" (emphasis added).³⁴

However, the Commission did not find that the application concerned matters in respect of which the Special Court offered the applicant the possibility of an effective and sufficient means of redress, that is, that the Special Court lacked competence to rule on the matter - basically alleged procedural errors - of which the applicant complained. Accordingly, the application was declared inadmissible.

This decision may be understood to mean that it is not normally required that an applicant should petition *Den særlige Klageret* in order to exhaust domestic remedies within the meaning of Article 26. If the Court has,

³³ Cf. 37 Collection, pp. 82 ff., at p. 89.

³⁴ Ibid., at p. 96.

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however, been petitioned, the 6 months limit may be calculated from the decision of the Special Court, provided the petition concerns matters of which the Special Court is competent.³⁵

Finally, in Application No. 10326/83, also concerning the question whether or not the six months period provided for in Article 26 of the Convention should be calculated from the date of the decision of *Den særlige Klageret*, the Commission accepted the arguments put forward steadily by the Danish Government over three decades, that *Den særlige Klageret* is an extraordinary remedy within the meaning of Article 26 of the Convention. Thus the Commission referred to

"... its extensive jurisprudence according to which an application for retrial or similar extraordinary remedies cannot, as a general rule, be taken into account in the application of Article 26 of the Convention [...] It is true that the Commission has sometimes, in view of the particular circumstances of the case concerned, accepted a petition to the Special Court of Revision as a remedy to be exhausted under Article 26 of the Convention [...] In one previous decision [...] however, the Commission expressly stated that it left the question whether or not recourse to the Special Court of Revision is a remedy, within the meaning of Article 26, open for consideration in any future case.

In the present case the Commission finds it desirable to base its decision on an interpretation of Article 26 consistent with its extensive jurisprudence regarding applications for retrial and similar remedies. In accordance with this jurisprudence, an application to the Special Court of Revision should not normally be taken into consideration as a remedy under Article 26 of the Convention [...]

Consequently, the petition to the Special Court of Revision did not constitute a domestic remedy under the generally recognized rules of international law, and the decision of that Court cannot be taken into consideration in determining the final decision for the purpose of applying the six months' time-limit laid down in Article 26."³⁶

In Application No. 2385/64 the applicant had failed to appeal against a decision taken by the High Court to the *Norwegian Høyesterett* and, consequently, failed to exhaust domestic remedies. The fact that the applicant subsequently lodged a petition for the re-opening ("*gjenopptakelse*") of the proceedings "was not, having regard to the special preliminary conditions to be satisfied, effective and sufficient remedies, and... [did]... not, therefore, constitute domestic remedies under the generally recognized rules of

³⁵ Cf. Bernhard & Lehmann (1985), pp. 37 f.

³⁶ Cf. 35 Collection, pp. 218 ff., at pp. 221 f.

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international law."³⁷

Also in *Sweden* the re-opening [*"resning"*³⁸] of a case is normally not considered a remedy which the applicant has to exhaust.³⁹

In Application No. 1739/62⁴⁰ the applicant had on a number of different occasions lodged petitions for the re-opening of civil proceedings to which he had been a party in accordance with Chapter 58 of the *Swedish Code of Procedure*. Since it followed from the title of Chapter 58 *that* the remedies mentioned are extraordinary; *that* the proceedings relating to these remedies do not until successful affect the validity of the final decision; and *that* the applicant's petitions, under the provisions of *Swedish law*, for a re-opening of the case were not effective and sufficient remedies and did not, therefore, constitute domestic remedies under the generally recognized rules of international law, the Commission found that the six months limit could not be calculated from the date of the rejection of the petition of the re-opening of the case.

In Application No. 3788/68⁴¹ the applicant had failed to observe a time-limit for bringing an appeal before the *Swedish Regeringsrätten*. However, he had lodged an appeal with *Riksdagens Ombudsman* and *Justitiekansleren*. Subsequently, the applicant requested a *restitutio in integrum* which was dismissed by *Regeringsrätten*, since the applicant had failed to establish that he had been unable to make an appeal in time for reasons of bad health. Then the applicant filed a complaint with *Högsta Domstolen* and the King-in-Council who both, for obvious reasons, dismissed the appeal. Finally, the applicant requested a re-opening of the case before *Regeringsrätten* which was also dismissed.

Since the applicant had failed to lodge an ordinary appeal with *Regeringsrätten* in time, the Commission held that he had not exhausted domestic remedies. Neither the request for *restitutio in integrum* nor the request for a

³⁷ Cf. 22 Collection, pp. 85 ff., at p. 88.

³⁸ The *Swedish* term "*resning*" is here - in accordance with the terminology employed by the Commission and Court - translated as "a re-opening of the case". However, the term is sometimes translated as "relief for substantive defect". See Gustaf Petré: *Consequences of the Ratification of the European Convention on Human Rights*, in Sundberg (1986/2), p. 47 note 15.

³⁹ Cf. Erik Friberg, *op.cit.*, p. 36.

⁴⁰ Cf. 13 Collection, pp. 99 ff.

⁴¹ *Ibid.*, at pp. 56 ff.

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re-opening of the case could substitute the failure to lodge an ordinary appeal. The same applied to the complaints lodged with the *Högsta Domstolen* and the King-in-Council respectively.

Similarly, in Application No. 10537/83⁴² the Commission considered that a request for the re-opening of a case concerning the Government's decision to grant an expropriation permit before *Regeringsrätten* could not as a whole be regarded as an effective remedy within the meaning of Article 26 of the Convention. Accordingly, the decision of *Regeringsrätten* on the re-opening could not be taken into account when calculating the six months period.

On the contrary, in Application No. 7805/77⁴³ the Commission considered whether the applicant's petition for a re-opening of the case to *Högsta Domstolen* was a remedy which needed to be exhausted and, consequently, for the calculation of the six months period in Article 26 of the Convention.

The Commission first observed that a procedure which is directed towards the re-opening of a case or a retrial of its merits is not normally a remedy which needs to be exhausted and which can be taken into account for the purposes of the six months rule.⁴⁴ But the Commission then went on:

"In the applicant's case, however, he based his appeal on a provision of the *Swedish Code of Civil Procedure* according to which the Supreme Court may examine whether the application of the law [...] was manifestly contrary to the law under Chapter 58, Article 1, sub-paragraph 4. Such an appeal is only allowed if brought within six months after the decision of the Court in question [...] The appeal was not admitted because the case did not disclose any obvious inconsistency with the law. If it had been admissible the Supreme Court would have acted further as a court of cassation. According to Chapter 58, Sections 6 and 7 of the *Swedish Code of Judicial Procedure*, the Supreme Court may order that a judgment should not be executed and, if it admits a case, it may choose to send the matter back to the lower court, or, if the case is obvious, the Supreme Court may decide itself. In the Commission's case-law, appeals on points of law and pleas of nullity have always been held to be important for complying with the requirements of Art. 26 [...] Furthermore, since the Supreme Court pronounced negatively on the merits of the appeal, any possible

⁴² Cf. 44 D.R., pp. 98 ff.

⁴³ Cf. 16 D.R., pp. 68 ff.

⁴⁴ See for example Application No. 1739/62, cf. 13 Collection, pp. 99 ff., and Application No. 2385/64, cf. 22 Collection, pp. 85 ff.

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remedy would be likely to lack prospects of success."⁴⁵

Consequently, in the circumstances of this application the Commission accepted that the applicant's recourse to *Högsta Domstolen* was an effective remedy and that the six months period should run from the date of the decision of *Högsta Domstolen*.

It is difficult to say why the Commission in this case accepted the re-opening of the case as an effective remedy within the meaning of Article 26. The short time-limit as well as *Högsta Domstolen's* possibility of acting as Supreme Court proper and not only a court of cassation in the proceedings on the re-opening may explain the Commission's position on this point. However, in the light of the Commission's subsequent case-law (see *supra*) it is probably doubtful whether this decision reflects the present state of law.

17.2.4. Judicial Authorities.

In Application No 4475/70⁴⁶ the Commission finally was "... fully satisfied, for the reasons submitted by the Respondent Government, that the action brought by the applicant before..."⁴⁷ the *Swedish Arbetsdomstolen* [the Labour Court] was an effective and sufficient remedy for the purpose of Article 26 of the Convention and that, accordingly, *Arbetsdomstolen's* judgment in the case constituted the "final decision" from which the six months period must be considered as having started to run.⁴⁸ The Government had strongly submitted that the question at issue was a question of interpretation whether the obligation to negotiate set forth in the 1936 Act on the Right to Organize and Negotiate meant that the parties must negotiate

⁴⁵ Cf. 16 D.R., p. 71.

⁴⁶ Cf. 38 Collection (first decision), pp. 68 ff., and 42 Collection (second decision), pp. 1 ff.

⁴⁷ Cf. 42 Collection, p. 13.

⁴⁸ In its first decision the Commission did not find itself able to decide on the issue under Article 26 and found that this issue should be joined to the merits. This was due to the fact (1) that the question whether *Arbetsdomstolen's* decision was the final decision within the meaning of Article 26 depended upon the question whether *Arbetsdomstolen* was, in the circumstances, competent to correct the violation of the Convention alleged by the applicant; (2) this again depended upon the question whether *Swedish* law and in particular the 1936 Act, which bound the *Arbetsdomstolen*, were in conformity with Article 11 of the Convention; and (3) this question involved a study of *Swedish* law and an interpretation of Article 11 and was obviously closely linked to this substantial issue whose determination by the Commission would depend upon an examination of the merits of the case, cf. 38 Collection p. 76.

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with the intention of concluding a formal agreement. In the Government's view, there was no clear previous jurisprudence in this matter and the proceedings could not be said to be without any chance of success.

In the subsequent Applications Nos. 5589/72⁴⁹ and 5614/72⁵⁰ the Commission took it for granted that the judgment of *Arbetsdomstolen* was the "final decision" within the meaning of Article 26.

In Application No. 6930/74⁵¹ the applicant complained about criminal proceedings which had been instituted against him and pending between 1959 and 1964. Subsequently, he instituted civil proceedings for damages. The *Høyesterett* finally rejected this claim in 1974. According to the Norwegian Government the civil proceedings for damages introduced by the applicant could not be regarded as re-opening the earlier proceedings for the purpose of the six months' rule.

The Commission noted that these civil proceedings did not affect the character of the criminal proceedings nor the applicant's conviction having the force *res judicata*. Moreover, it was true that the *Høyesterett* could have awarded the applicant compensation in 1974, provided that it could be assumed that he had a financial loss by reason of the errors committed in connection with the criminal proceedings. "In the Commission's view, however, the civil proceedings for damages... [could not]... on the mere ground be regarded as an effective and sufficient remedy under the generally recognized rules of international law."⁵²

In Application No. 10873/84 the Commission considered that the issue whether the possibility of bringing litigation against the Swedish State under the 1974 Tort Liability Act was an effective remedy in regard to the revocation of a licence to serve alcohol, was a question inseparable from the merits of the applicant's complaint under Article 6(1), and it should therefore not be determined under Article 26.⁵³

On the contrary, in Application No. 10371/83⁵⁴ the Swedish Go-

⁴⁹ Cf. 42 Collection, pp. 123 ff.

⁵⁰ Cf. 42 Collection, pp. 130 ff.

⁵¹ Cf. 9 D.R., pp. 37 ff.

⁵² Ibid., at p. 39.

⁵³ Cf. 44 D.R., pp. 246 ff., at p. 253.

⁵⁴ Cf. 42 D.R., pp. 127 ff.

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verment contended that the applicant had not exhausted domestic remedies as required by Article 26 of the Convention since he did not, after *Justitiekansleren* had rejected his claim for compensation for his detention, sue the State before the ordinary courts claiming compensation for the detention based on section 3 of the 1974 Act on Compensation in Case of Restrictions on Liberty or the 1972 Tort Liability Act.

The Commission concluded that the applicant could have brought an action against the State before the ordinary courts on the basis of the 1974 Act. Moreover, the Commission was of the opinion that it could not be "clearly established" that such an action would "be futile", since there was no case-law to support the contention that an action before the courts would be meaningless. Consequently, the applicant had not exhausted domestic remedies.

17.2.5. The Ombudsmen.

In Application No. 3893/68⁵⁵ the Commission ruled that a complaint to *Riksdagens Ombudsmän* was not an ordinary remedy which should be exhausted before lodging a complaint with the Commission. Consequently, the decision of the Ombudsman should not be included in the calculation of the six months period. Likewise, in Application No. 9959/79,⁵⁶ in a case concerning the Government's decision to expel the applicant from Sweden and in Application No. 10371/83 (see *supra* section 17.2.4) concerning a claim for compensation for the applicant's detention, the Commission held that an examination and decision by *Justitiekansleren* could not be taken into account in the application of Article 26 of the Convention.

In Application No. 11704/85 one of *Riksdagens Ombudsmän*, on his own motion, had started an investigation of the matters of which the applicant complained to the Commission. The Ombudsman asked the Public Prosecutor to make a first examination as to whether there were reasons to institute criminal proceedings against a Deputy Chairman of the Social District Council and a President of the Regional Administrative Court. After having concluded his examination the public prosecutor recommended that criminal proceedings be instituted against the said civil servants for misuse of public power and negligent exercise of public power. However, in the end the Ombudsman

⁵⁵ Cf. 33 Collection, pp. 8 ff.

⁵⁶ Cf. 37 D.R., pp. 87 ff.

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decided not to institute any criminal proceedings.

In these circumstances, the Commission considered that, even if it would still have been open to the applicant to institute proceedings against the Deputy Chairman and the President, such an action could not be regarded as a remedy within the meaning of Article 26 of the Convention for the alleged violation of Article 8 of the Convention.

17.2.6. Other Administrative Authorities.

In Application No. 4210/69⁵⁷ the applicant had in *general terms* complained to the Public Prosecutor about the manner in which he was transported from a prison to another criminal institution. Since he had not "... raised any complaints in this respect before the competent courts and authorities", the Commission held that he had failed to show that he had exhausted remedies available to him under *Norwegian* law.

In Application No. 5525/72 the applicant complained about violations of a number of Articles of the Convention in connection with criminal proceedings instituted against him and a subsequent expulsion order. The applicant had lodged complaints with the Public Prosecutor and the Chief Constable of Stockholm. The Commission found, however, "... that the various complaints made by the applicant or his friends to the police or the Public Prosecutor with regard to certain of these matters did not constitute effective remedies for the purpose of Article 26 of the Convention."⁵⁸

In Application No. 12258/86 the *Swedish* Government submitted that the applicants had failed to exhaust domestic remedies required under Article 26 of the Convention. They referred to the fact that the applicants did not appeal against the building plan which was adopted in 1962. They also submitted that if the applicants have failed to appeal against that plan as a result of incorrect information allegedly given by the authorities, they could have asked for the time-limit for an appeal to be restored. The Government also submitted that the applicants could have asked *Länsstyrelsen* [County Administrative Board] to alter the building plan. They further maintained that the applicants had themselves prevented a further examination of the matter since they had not accepted the development agreement proposed by the municipality. Finally, the Government submitted that the applicants had not

⁵⁷ Cf. 35 Collection, pp. 144 ff.

⁵⁸ Cf. 43 Collection, pp. 111 ff., at pp. 115.

Other Administrative Authorities

appealed against the decision of the Building Committee of 24 March 1986.

The Commission noted that the application was not directed against the adoption of the building plan in 1962, but against the decision of the Building Committee of 24 March 1986 refusing the applicants' request for a building permit. Therefore, the remedies referred to by the Government with regard to the building plan and the development agreement could not be considered as remedies against this decision. The Commission continued:

"The only submission of non-exhaustion which remains to be examined is the allegation that the applicants could have appealed against the decision of the Building Committee to the County Administrative Board, had they considered that an exemption from the building plan was not necessary or that the issue had not been properly handled. The Government admit that no appeal lies against the decision insofar as it relates to the refusal to grant an exemption from the building plan. However, the applicants do not make any submission to the effect that the application for a building permit was incorrectly dealt with or that an exemption from the building plan was unnecessary. The applicants appear to admit that such an exemption was required.

In these circumstances, the Commission cannot find that there was an effective remedy which the applicants failed to exercise. It follows that the application cannot be rejected for non-exhaustion of domestic remedies".⁵⁹

⁵⁹ Cf. Report of the Commission, p. 43.

CHAPTER 18

Article 13 of the European Convention in Proceedings before the European Commission and Court

18.1 Introduction.

Article 13 of the ECHR provides that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."¹

The European Court has laid down that the following general principles are of relevance for the interpretation of Article 13:

"(a) where an individual has an *arguable claim* claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress [...]

(b) the authority referred to in Article 13 need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective [...]

(c) although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so [...]

(d) Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms..."(emphasis added).²

The Commission has in addition, *inter alia*, held that

(e) where the highest national court is alleged to have breached the Convention, the application of Article 13 is subject to an implied limitation [...] *i.e.* Article 13 does not normally grant a further remedy against acts and decisions by the highest national

¹ For a general account, see, for example, Danelius (1989), pp. 158 ff.; Fawcett (1987), pp. 289 ff.; and Jacobs (1975), pp. 215 f.

² Cf. Eur. Court H.R., *Leander Case*, Series A, Vol. 116 (1987), para. 77. In the case the Court itself made references to Eur. Court H.R., *Case of Silver and Others*, Series A, Vol. 61 (1983), para. 113; and Eur. Court H.R., *Case of James and Others*, Series A, Vol. 98 (1986), para. 85.

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court.³

It follows from these general principles that in many cases the application of Article 13 involves submissions and considerations on the domestic position of the Convention.

For the purposes of this part of the study it is not necessary to go into the discussion of how to distinguish between Articles 13 and 26; the application of these Articles of the Convention is employed only to illustrate the way in which the *Scandinavian* Governments plead their cases, and how the Commission and Court evaluate this argumentation, rather than providing an in-depth exposition of the application of the said Articles.

Since the Court on a number of occasions⁴ has held that Article 13 is entirely absorbed in Articles 6(1) and 5(4) and has thus not found it necessary to rule on Article 13, it is, for the purpose of this part of the study, necessary also to include the application of these Articles in the discussion. In many instances the application of Articles 6(1) and 5(4) provide, however, due to their more specific character, material which is less illustrative as regards the domestic position of the Convention. Accordingly, the sections on these Articles are more concentrated than the large number of cases concerning in particular Article 6(1) would suggest.

18.2. Article 13.

18.2.1. General Principles.

In the *Swedish Engine Drivers' Union Case* (see *supra* chapter 16) the Court held that it does not follow from Article 13 of the Convention that the Contracting States are obliged to incorporate the Convention into domestic law.⁵

In Application No. 9297/81⁶ the applicant complained that *Swedish* law did not provide him with an effective remedy before a national authority in a dispute with the Swedish Television. The Commission found that, as the Government decides which company has the right to broadcast programmes

³ Ibid., Report of the Commission, para. 89.

⁴ See for example Eur. Court H.R., *Sporrong and Lönnroth Case*, Series A, Vol. 52 (1982), para. 88.

⁵ Cf. Eur. Court H.R., *Swedish Engine Drivers' Union Case*, Series A, Vol. 20 (1976), para. 50.

⁶ Cf. 28 D.R., pp. 204 ff.

General Principles

and as the rules for that company are laid down either in the Radio Act or in an agreement with the Government, envisaged by the Radio Act, it was in fact the effect of legislation or what may be delegated legislation that were the main objects of the applicant's complaints (see *supra* section 18.1). Accordingly, Article 13 was not applicable to the case.

On the other hand, in Application No. 8811/79 the applicants complained that under domestic *Swedish* law they were forbidden from punishing their children corporally. The Government questioned in their submissions whether the applicants were victims within the meaning of Article 25 of the Convention.

The Commission referred to its own case-law in which it had constantly held that the very existence of legislation may justify an applicant's claim to being a victim within the meaning of Article 25 of a violation of one of its normative provisions where the legislation continuously and directly affects him. Then, it was held:

"In the present case the applicants are all parents who have the custody of children. They are therefore all *ipso facto* affected by the provisions of the Code of Parenthood and, in the light of their firm religious convictions as to the appropriateness of physical chastisement of children by their parents they are, in the Commission's view clearly affected by the provisions of the Code and the state of criminal law in *Sweden* which they submit criminalizes behaviour which they regard necessary and proper."⁷

18.2.2. Judicial Remedies.

In Application No. 10465/83 the Commission held that the possibility of lodging a separate appeal with the *Swedish* Administrative Courts against decisions by *Sociala Distriksnämnden* [the Social District Council] concerning religious upbringing in a foster home was an "effective remedy" within the meaning of Article 13 of the Convention.

In Application No. 11704/85 the Commission found that Article 13 did not require a further remedy to *Regeringsrätten* in a case where the applicant had had the possibility of lodging an appeal against a provisional care order first to the *Länsrätt* and then to the *Kammarrätt*.

In Applications Nos. 9278/81 and 9415/81 following the *Alta Case* before the *Høyesterett* (see *supra* section 6.3) the applicants, two Lapps who had been demonstrating against the construction of a hydroelectric power

⁷ Cf. 29 D.R., p. 104 ff., at p. 109.

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station on the Alta river and subsequently fined for refusing to obey an order from the police to leave the square in front of the *Norwegian* Parliament, where the demonstration was held, stated that when the demonstrations took place, the *Norwegian* Government had already decided to start the works. They submitted that it would have been impossible for them to institute court proceedings claiming that they were the legal possessor of this particular part of *Norway*. Even if they had instituted such proceedings, the applicants submitted that the works would probably have been finished by the time the final court decision would have been taken or, at least, much damage would have been done. Hence the applicants maintained that they had no effective remedy under domestic *Norwegian* law.⁸

The Commission first recalled that, as a result of the Government's decision to implement the Alta project, the responsible State authority brought the necessary action before the Alta District Court, for the determination of the compensation to be paid, and other measures to be ordered. The District Court's judgment was subsequently reviewed by the *Høyesterett*, sitting in plenary session, who confirmed the judgment of the District Court, cf. NRt. 1982.241. In these proceedings the applicants could, in the Commission's view, have presented any claims they might have had in connection with the Alta river project. It would also have been open to them to institute separate court proceedings with regard to such claims. Consequently, the applicants had had an effective remedy within the meaning of Article 13 of the Convention.⁹

18.2.3. Administrative Remedies.

In Application No. 10801/84 concerning involuntary commitment to a mental hospital, the *Swedish* Government submitted that *Utsktivningsnämnden* [the Discharge Council] and *Psykiatriska Nämnden* [the Psychiatric Council] satisfied the condition of an "effective remedy" within the meaning of Article 18.¹⁰ The Commission did not, however, rule on this point since it found that it followed from the terms of the applicant's submissions that it was basically the legislation as such that she was attacking. Insofar as the application could be understood to concern lack of an effective remedy for

⁸ Cf. 35 D.R., p. 30 ff., at p. 34.

⁹ *Ibid.*, at p. 37.

¹⁰ Cf. Report of the Commission, para. 91.

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an alleged violation of Article 8 of the Convention, the applicant could not be said to have an "arguable claim" of a violation of Article 8, since the Commission had held the Article 8 complaint "manifestly ill-founded".¹¹ However, in its decision on the admissibility, the Commission had found that the aforesaid submissions raised "... issues of fact and law which are of such importance that their determination should depend upon an examination of the merits."¹²

In Application No. 9330/81¹³ the *Swedish* Government submitted that the applicant had a remedy to the Government against a decision to expel him, and to *Regeringsrätten* against a decision to hold him in custody. They maintained that Article 13 of the Convention does not require a further remedy for the enforcement of a decision which has already been examined by the authorities. Moreover, in any event the applicant could have brought a criminal action or a civil action against any public servant for misuse of office or careless misuse of office under Chapter 20, section 1, of the *Swedish* Penal Code, if the applicant had been harmed by any act or omission by such a servant. In such proceedings the applicant could have claimed damages. The Government, concluded, therefore, that the applicant had an effective remedy, and that the complaint was manifestly ill-founded.

After having carried out a preliminary examination of the issues raised, the Commission considered that the complaint raised several issues of fact and law, which were of such an important and complex nature that their determination should depend upon a further examination of the merits. However, a friendly settlement was subsequently reached, and the Commission did not get the opportunity to rule on this point. It was part of this settlement that the Government should appoint a Commissioner to deal with "... the question of a remedy on the enforcement stage of an expulsion order" and "... to propose such new rules for which the analysis may give cause".¹⁴

¹¹ *Ibid.*, para. 93. Similarly, the applicant complained that the Discharge Council and the Psychiatric Council were not "tribunals" or "courts" within the meaning of Articles 6(1) and 5(4) but, since the Commission did not find that these provisions were applicable to the question at issue, it did not have to rule on this point.

¹² Cf. 45 D.R., p. 189.

¹³ Cf. 35 D.R., pp. 57 ff.; and 39 D.R., pp. 75 ff.

¹⁴ Cf. 39 D.R., p. 79.

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In the *Leander Case*,¹⁵ concerning the use of information kept in a secret police-register when assessing a person's suitability for employment in a post of importance for national security, the Swedish Government argued that Swedish law offered sufficient remedies for the purpose of Article 13, namely

- (a) a formal application for the post, and, if unsuccessful, an appeal to the Government;
- (b) a request to the National Police Board for access to the secret police-register on the basis of the Freedom of Press Act, and, if refused, an appeal to the administrative courts;
- (c) a complaint to *Justitiekansleren*;
- (d) a complaint to *Riksdagens Ombudsmän*.¹⁶

As regards *Riksdagens Ombudsmän* and *Justitiekansleren* the Court noted that (1) these officials had competence to receive individual complaints, and that they had the duty to investigate such complaints in order to ensure that the relevant laws had been applied properly; (2) in the performance of their duties, both officials had access to all the information contained in the secret police-register; and (3) in the present context both officials must be considered independent from the Government.¹⁷

Although the opinions of *Riksdagens Ombudsmän* and *Justitiekansleren* by tradition command great respect in Swedish society and in practice are usually followed, the Court stressed that both officials, apart from their competence to institute criminal and disciplinary proceedings, lack the power to render legally binding decisions. However, the Court did not state explicitly whether or not it found that *Riksdagens Ombudsmän* or *Justitiekansleren* were sufficient remedies for the purpose of Article 13, but it follows from the context that the Court did not, just as the Commission did not,¹⁸ find that these remedies were sufficient under Article 13.

¹⁵ Cf. Eur Court H.R., *Leander Case*, Series A, Vol. 116 (1987).

¹⁶ *Ibid.*, at para. 80.

¹⁷ *Ibid.*, at para. 81.

¹⁸ In its decision on the admissibility, the Commission found that neither a formal application for the post nor a request to the national Police Board for access to the secret police-register were "effective and sufficient" remedies which the applicant ought to have

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Similarly, the Court was not clear in its reasoning whether a complaint to the Government was an "effective remedy" within the meaning of Article 18. On the one hand, the Court recalled that the authority referred to in Article 13 need not necessarily be a judicial authority in the strict sense. Thus it found that there could be "... no question about the power of the Government to deliver a decision binding on the Board". On the other hand, the Court ruled that

"[e]ven if, taken on its own, the complaint to the Government were not considered sufficient to ensure compliance with Article 13, the Court finds that the aggregate of the remedies set out above [...] satisfies the conditions of Article 13 in the particular circumstances of the instant case..."¹⁹

The Court's reasoning in this case is not consistent. As stressed by judge Ryssdal in his dissenting opinion,²⁰ the Government did not address the applicant's basic grievance under the Convention. Even if the requirements of secrecy did not permit him to be given the opportunity of commenting on the adverse material kept on him in the register, Article 13 guaranteed him a right of access to a "national authority" having competence to examine whether his Convention grievance was justified or not. Against this background, and since the Court held that neither *Riksdagens Ombudsmän* nor *Justitiekansleren* could be regarded as such remedies, the applicant did not have an effective remedy before a national authority. In other words, as pointed out in the partially dissenting opinion of judges *Pettiti* and *Russo*, "... ineffective remedies cannot amount to an effective remedy where, as in the instant case, their respective shortcomings do not cancel each other but are cumulative".²¹ Or, as another observer has expressed it, the Court's reasoning could be described as $0 + 0 + 0 + 0 = 1$.²²

However, it may be concluded from these judgments that neither *Justitiekansleren* nor *Riksdagens Ombudsman* are effective remedies within

exhausted, cf. 34 D.R., p. 85.

¹⁹ Ibid., at para. 84.

²⁰ Ibid., at p. 34.

²¹ Ibid., at p. 35.

²² Cf. Peter Germer: *Administrative Secrecy under the European Convention on Human Rights in Secrecy and Openness: Individuals, Enterprises and Public Administration*, The Proceedings of the Seventeenth Colloquy on European Law, Zaragoza 21-23 October 1987, Strasbourg (1988), pp. 61 ff., at p. 71.

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the meaning of Article 13, whereas a complaint to the Government, in a system like the *Swedish* one, may in certain circumstances be an effective remedy in this sense.

In the *Eriksson Case*²³ the *Swedish* Government submitted that the applicant had an effective remedy against decisions taken by *Sociala Distriktsnämnden* since the activity of the Council is subject to supervision by *Riksdagens Ombudsmän* whose functions and powers are basically laid down in Chapter 12, section 6, of the Instrument of Government and the 1975 Act on the Instruction to the *Riksdagens Ombudsmän*. The Ombudsman is elected by Parliament, and one of his particular duties is to ensure that the fundamental rights and freedoms of citizens are not encroached upon in the process of administration. In fulfilling this duty, he is empowered to receive complaints lodged by individuals, to carry out the inspections and investigations he considers necessary, and to render decisions in which he states his opinion as to whether a measure or omission on the part of an authority or an official is illegal or otherwise inappropriate. The Ombudsman is also vested with the authority to prosecute officials or initiate disciplinary measures against them.²⁴

Since the Commission had found a violation of Article 6(1) of the Convention, and "... the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6(1)" (see *infra* section 18.3), the Commission did not find it necessary to examine whether the supervision of *Riksdagens Ombudsman* is an effective remedy within the meaning of Article 18.

In the *Sporrong and Lönnroth Case* the applicants submitted, *inter alia*, that *Swedish* law did not provide them with an effective remedy against a Government decision granting an expropriation permit. This applied even if the decision later proved to be in conflict with either the *Swedish* law or the Convention.²⁵

The Government first explained "... that *Sweden* had a dualistic system in that international agreements did not become directly and automatically part of *Swedish* domestic law. The normal procedure was to transform the international convention into a *Swedish* act which was then the instrument which was to be applied by the *Swedish* public authorities."²⁶ In the Government's view this procedure was compatible as such with the Convention, since the Court had ruled that Article 13 does not require that

²³ Cf. Eur. Court H.R., *Eriksson Case*, Series A, Vol. 156 (1989).

²⁴ *Ibid.*, Report of the Commission, para. 178.

²⁵ Cf. Eur. Court H.R., *Sporrong and Lönnroth Case*, Series B, Vol. 46 (1986), Report of the Commission, para. 51.

²⁶ *Ibid.*, at para. 83.

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the national authority shall examine a complaint with direct reference to the Convention, it being sufficient that the national law contains rules which in substance correspond to the provisions of the Convention (see *supra* chapter 16).

In the next place the Government submitted that under *Swedish* administrative law the Government takes a number of purely administrative decisions of a basically legal nature. Sometimes these decisions were taken upon appeal from lower administrative bodies and sometimes in the first instance. Insofar as these decisions were taken in application of laws enacted by Parliament and duly promulgated, the Government was legally obliged to observe any conditions, procedures or other rules which might be laid down by the law in question. Therefore, when exercising functions of this kind, the Government was not acting as a purely political body but rather as a quasi-judicial body which had to make an examination of the concrete case on the basis of the law.²⁷

Finally it was submitted that when the Government was acting upon appeal from a lower administrative agency, such an appeal was an effective remedy of the kind dealt with in Article 18. Consequently, "... when, in certain circumstances, a person is given the privilege of having his case examined in the first instance by the highest and most qualified body of the land, he should not then be able to claim a further general appeal from that body."²⁸

Regarding these submissions the Commission first held that Article 13 did not guarantee a remedy allowing the national laws as such to be challenged before a national authority (see *supra* section 18.1). Then the Commission held that:

"158. In the opinion of the Commission, however, neither the Government's above argument, nor the text of Article 13 itself can be taken as a basis for such a restriction of the right set out in that Article which is guaranteed "notwithstanding that the violation has been committed by persons acting in an official capacity". Even if these words are seen as an element suggesting that the scope and purpose of the Article is not unlimited, they do not restrict it to acts committed at lower levels of the State, or by persons acting individually rather than as members of higher or lower corporate bodies. The Commission considers that the purpose of Article 13 would only be met if a "national authority" were in some way competent to apply

²⁷ *Ibid.*, at para. 84.

²⁸ *Ibid.*, at para. 87.

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the Convention or corresponding principles of national law effectively as a corrective against alleged violations resulting from administrative decisions taken at any level."

Thus, when the Government is the first and only instance - be that a privilege or not - Article 13 requires that a further remedy is available.

However, in the alternative the Government forwarded the "theory" that one might say that "... the first decision to include the applicant's properties in an expropriation plan or to prolong the validity of such a plan, was not the decision taken by the Government but the decision taken by the municipal authority."²⁹ Since the first decision with regard to the expropriation permits or prolongations thereof might not be that of the Government but that of the municipal authority, it was possible to launch an appeal against this decision. When the municipal authority decided to ask the Government for an expropriation permit, such a decision by the authority might be attacked in the form of an appeal first with *Länstyrelsen* and subsequently with *Regeringsrätten*. According to *Swedish* law, one ground of appeal that could be invoked in such a case was that the decision of the municipal body violated individual rights. If this appeal was accepted by the Board or the Court, the result would be that the decision of the municipal authority to ask for an expropriation limit would be quashed.

Regarding this "theory" the Commission stated:

"160. The Commission cannot accept the preceding arguments put forward by the Government...

161. The Commission is furthermore of the opinion that the decision of the City Council to expropriate properties must be considered to be a mere preliminary step in the administrative procedure which may eventually lead to the granting by the Government of a permit to expropriate [...] It is within the exclusive competence of the Government to grant an expropriation permit and, in so doing, they act as an organ of first and final instance. Therefore, it cannot be considered that, in being seized with a demand for an expropriation permit, the Government would act as an instance of appeal and thereby constitute a remedy within the meaning of Article 13 of the Convention.

162. It is true, in the next place, that apart from the normal procedure considered in the preceding paragraph, there is, in principle, a right to lodge a municipal appeal against decisions taken by the municipal council [...] However, it is of importance to note in this context that the decisions of the municipal council are not communicated to the persons affected by them. What is announced on the municipal notice

²⁹ *Ibid.*, at para. 86.

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board is merely that the minutes concerning the decision taken have been approved, as well as the place where the minutes can be consulted. Furthermore, the right to lodge a municipal appeal to the County Administrative Board and to the Supreme Administrative Court is circumscribed and the competence of these bodies does not extend to the whole field envisaged by Article 18. The Commission observes moreover that it has not been shown that a municipal appeal has ever successfully been made against a decision of a municipality to apply to the Government for an expropriation permit or for an extension of the validity of an already existing permit. The respondent Government have in this respect even admitted that they are not aware of any case where such an appeal has been lodged. In these circumstances, the Commission considers that the mere theoretical possibility of bringing an appeal can be disregarded for the purpose of Article 13 of the Convention. In the light of these facts the Commission concludes that a municipal appeal cannot either be considered to be a separate effective remedy within the meaning of Article 18."

Consequently, the Commission found that Article 13 of the Convention had been violated. The Court did not rule on this point since it found, like the minority of the Commission, that Article 6(1) had been violated in the case.

18.3. Article 6(1).

18.3.1. Introduction.

Article 6(1) of the Convention reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice."

This paragraph establishes the principle of fair hearing in certain judicial proceedings - namely those concerning "the determination of his civil rights and obligations or of any criminal charges against him" - and rules of publicity of those proceedings. The reason why Article 6(1) frequently absorbs the Article 13 complaint is that "a fair and public hearing within a reasonable time by an independent and impartial tribunal" is a narrower concept than "an effective remedy before a national authority" (see *supra* section 18.1).

18.3.2. The Composition of "Tribunals".

In Application No. 9893/82 concerning the proceedings on the award of parental custody over a young child the applicant submitted that it was con-

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trary to Article 6(1) of the Convention that a *Kredsret* [Regional Court] in Greenland had consisted in one session of the ordinary judge and two lay judges, of whom one was the local Head of the Social Authorities and knew the applicant and the mother of the child through the applicant's many previous unsuccessful attempts to obtain access to the child. Since this lay judge, as Head of the Social Authorities, had agreed to the Social Authorities' refusals to help him against the mother, he could not possibly make any impartial decisions in this case.³⁰

The Commission noted that the Head of the Social Authorities had only acted in the first court session as lay judge. Furthermore, none of the parties was present and no decision concerning the case was taken. Taking this into consideration, the Commission found that this part of the application was manifestly ill-founded.³¹

In Application No. 10873/84 the Commission ruled that *Länsstyrelsen* and *Socialstyrelsen* [the National Board of Health and Welfare] were administrative organs and thus did not constitute a "tribunal" for the purposes of Article 6(1).

Moreover, in the case the Government had suggested that the applicant under the *Swedish* Tort Liability Act could have brought the case before an ordinary court and allege that the authorities, having made a decision in an administrative matter, had made mistakes or had taken decisions which are contrary to domestic law. The Commission found, however, that the "... court action suggested by the Government would relate to whether the authorities had been negligent or at fault and not to whether the licence should have been revoked..." Therefore, this kind of proceedings were not sufficient for the purposes of Article 6(1) in the case at issue.³²

The *Sporrong and Lönnroth Case*³³ (see *supra* section 18.2) was the first case in which the *Swedish* administrative system was challenged under Article 6(1) of the Convention. In *Sweden* in a number of different types of cases - those with the most important political or financial implications - the Government has traditionally been either the first and only instance or the

³⁰ Cf. 37 D.R., pp. 50 ff., at p. 56.

³¹ Ibid.

³² Cf. Report of the Commission, para. 143.

³³ Cf. Eur. Court H.R., *Sporrong and Lönnroth Case*, Series A, Vol. 52 (1982).

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appeal instance. No ordinary appeal existed under this system against decisions taken by the Government.

In the case at issue the *Swedish* Government had under the Expropriation Act granted an expropriation permit and upheld a decision taken by *Länsstyrelsen* imposing a prohibition on construction on the applicants' properties. The question was then whether the proceedings before the Government or - as submitted by the Government - the possibility of a re-opening of the case before *Regeringsrätten* fulfilled the requirements set forth in Article 6(1). The Court, in contrast to the Commission, answered this question in the negative:

"86. The Government's decisions on the issue and extension of the permits are not open to appeal before the administrative courts.

Admittedly, owners can challenge the lawfulness of such decisions by requesting the Supreme Administrative Court to re-open the proceedings. However, they must in practice rely on grounds identical or similar to those set out in Chapter 58, Article 1, of the Code of Judicial Procedure [...] Furthermore, this is an extraordinary remedy - as the Government admitted - and is exercised but rarely. When considering the admissibility of such an application, the Supreme Administrative Court does not examine the merits of the case; at that stage, it therefore does not undertake a full review of measures affecting a civil right [...] It is only where the Supreme Administrative Court has declared the application admissible that such a review can be affected, either by that court itself or, if it has referred the case back to a court or authority previously dealing with the matter, by the latter court or authority. In short, the said remedy did not meet the requirements of Article 6 § 1."

In a number of subsequent applications both the Commission and Court has, in a more or less similar language in the different cases, held "... that proceedings before the Government did not constitute proceedings before a tribunal within the meaning of Article 6 para. 1 of the Convention", since no ordinary appeal to the courts lies against such a decision of the Government. Accordingly, this applies to cases concerning:

(1) The granting and extension of expropriation permits (*Sporrong and Lönnroth Case* (see *supra*), *Bodén Case*³⁴ and Application No. 10537/83).

(2) The imposition and maintenance in force of building/construction prohibitions (*Sporrong and Lönnroth Case* (see *supra*) and *Allan Jacobsson Case*³⁵).

³⁴ Cf. Eur. Court H.R., *Bodén Case*, Series A, Vol. 125 (1987), para 35.

³⁵ Cf. Eur. Court H.R., *Allan Jacobsson Case*, Series A, Vol. 163 (1989), paras. 75-77.

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- (3) The adoption of building plans (Application No. 11309/84).³⁶
- (4) Revocation of a licence to provide interurban public transportation (*Pudas Case*³⁷).³⁸
- (5) Revocation of a licence to serve alcoholic beverages (*Tre Traktörer AB Case*³⁹)
- (6) Permission to run classes in private schools (Application No. 11533/85).
- (7) Permission to acquire agricultural land (Applications Nos. 11855/85 and 12782/87).
- (8) An order to plant trees on one's own property (Application No. 12570/86).

Not only the lack of possibilities of appeal against administrative decisions within the *Swedish* administrative system has been challenged before the European Commission and Court, but also the question of whether certain (quasi-) judicial bodies are "independent and impartial" tribunals has been dealt with by the Commission and Court.

In Applications Nos. 8588/79 and 8589/79⁴⁰ the question was whether, in a case concerning a dispute over the prices of some minority shares, which the majority shareholder was legally entitled to buy, compulsory proceedings before three arbitrators by virtue of the *Swedish* Arbitration Act without recourse to the ordinary courts, fulfilled the requirements to "an independent and impartial tribunal" as set forth in Article 6(1) of the Convention.⁴¹

The Commission first stated that Article 6(1) prescribes that the hearing must take place before an "independent and impartial tribunal". It observed that there is a functional relationship between independence and impartiality, the former being essentially a precondition for the latter.⁴²

³⁶ See also Application No. 12258/86 concerning a building permit where *Byggnadsnämnden* [the Building Committee] decided the case in the last instance.

³⁷ Cf. Eur. Court H.R., *Pudas Case*, Series A, Vol. 125 (1987), para. 40.

³⁸ See also Application No. 12213/86 in which an appeal could be lodged with the central Board of Transport.

³⁹ Cf. Eur. Court H.R., *Tre Traktörer AB Case*, Series A, Vol. 159 (1989), para. 48.

⁴⁰ Cf. 38 D.R., pp. 31 ff.

⁴¹ For further information on the case, see Jacob W.F. Sundberg: *Human Rights in Sweden. The Annual Reports 1982-1984*, Stockholm (1985), pp. 64 ff.

⁴² *Ibid.*, at para. 33.

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As regards the case at issue, the Commission held that the applicant had not produced conclusive evidence establishing bias on the part of one or other of the arbitrators, *i.e.* the arbitrators were considered *impartial*. Hence the question was whether the arbitrators were *independent*:

"35. With regard to the criterion of independence, the Commission emphasizes that it is not sufficient that the arbitrators were in fact independent. Their independence must be seen by all to be incontrovertible. The Commission recalls in this respect that the maxim of English law "justice must not only be done; it must also be seen to be done", expresses an idea contained in Article 6(1) of the Convention."

The Commission then examined whether the Arbitration Board was independent of the Executive as well as of the parties of the case. Both questions were in principle answered in the affirmative. However, the Commission stated that "... in the arbitration system designed for dealing with the compulsory purchase of shares, it is inevitable that the Arbitration Board's independence from one of the parties cannot always be guaranteed. In regard to their relationship with the arbitrators they have themselves appointed, the parties may not always be an equal footing."⁴³ This led the Commission to the following conclusion:

39. The above considerations show the importance of pre-established courts to which are appointed judges who are totally unconnected with the case they are to hear. The tribunals referred to in Article 6 of the Convention are of this kind in the Contracting States. The Commission does not rule out the possibility of exceptions in specific procedures. On this assumption it considers that there must be a rigorous guarantee of equality between the parties in regard to the influence they exercise on the composition of the court. An examination of the facts reveals that such equality did not prevail in this case."

Consequently, the Commission found that Article 6(1) had been violated in the case.⁴⁴

In the *Langborger Case*⁴⁵ the main question was whether *Bostadsdomstolen* [the Swedish Housing and Tenancy Court], in the case at issue sitting

⁴³ *Ibid.*, at para. 37.

⁴⁴ The Swedish Parliament subsequently passed an amendment to the legislation according to which a party not satisfied with a decision of the arbitrators was entitled to start a procedure before an ordinary court, cf. Resolution DH (84) 4 of the Committee of Ministers, cf. 38 D.R., p. 43.

⁴⁵ Cf. Eur. Court H.R., *Langborger Case*, Series A, Vol. 155 (1989).

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with four judges, two lawyers, one of whom had a casting vote, and two lay assessors representing the Federation of Property Owners and the National Tenants Union respectively, was "an independent and impartial tribunal" when dealing with a dispute between, on the one side, an individual and, on the other, the essentially common interests of the Federation and the National Union of maintaining a negotiation clause in lease contracts. The Court answered this question in the negative, since

"33. The proceedings instituted in the House and Tenancy Court concerned essentially the question whether the negotiation clause was to be retained... and not how it was to be applied (the fixing of the rent payable by Mr Langborger).

34. Because of their specialised experience, the lay assessors, who sit on the Housing and Tenancy Court with professional judges, appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes. This does not, however, exclude the possibility that their independence and impartiality may be open to doubt in a particular case.

35. In the present case there is no reason to doubt the personal impartiality of the lay assessors in the absence of any proof.

As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim.

The fact that the House and Tenancy Court also included two professional judges, whose independence and impartiality are not in question, makes no difference in this respect."

Accordingly, the Court found that in the specific circumstances of this case the Housing and Tenancy Court was not an "independent and impartial tribunal" within the meaning of Article 6 of the Convention.⁴⁶ Although the circumstances of this case were to some extent special, it seems likely that

⁴⁶ In Application No. 10144/82, cf. 33 D.R., p. 278, the Commission held that the procedure by which a tenant's association requests the competent authority, in the last instance *Bostadsdomstolen*, to designate, as provided for in the relevant Swedish legislation, a special manager for a building, does not involve civil rights and obligations.

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this decision in the long run may have some far-reaching consequences for the *Scandinavian* legal systems where it is very common to set up different bodies with (judicial) decision-making power in specific areas with the participation of lay members representing interest organizations. This applies in particular to the labour system.

18.3.3. The Procedure before the "Tribunal".

In Application No. 10515/83⁴⁷ the Commission held that Article 6(1) of the Convention only provides certain guarantees in cases relating to the determination of civil rights and obligations or of a criminal charge. Therefore, this provision does not apply to the proceedings in which *Högsta Domstolen*, without entering on the merits, refused leave to appeal against a decision of the *Hovrätt*.

The question of the obligation to hold an oral hearing before the *Hovrätt* in minor cases was dealt with in the *Ekbatani Case*.⁴⁸ The applicant had been imposed 30 day fines, each of 20 SEK, in the *Tingsrätt*. He appealed against this sentence to the *Hovrätt* which, contrary to the applicant's request, rejected the holding of an oral hearing and upheld the *Tingsrätt's* sentence. The Government pleaded that, although there was no oral hearing before the *Hovrätt*, there was a "public hearing" within the meaning of Article 6(1) of the Convention since under the *Swedish Freedom of the Press Act* - which forms part of the *Swedish Constitution* - anybody has the right to have access to the written submissions of the courts.

However, neither the Commission nor the Court shared the Government's view. Thus the Court explained that, provided there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue. In this case

"... the Court of Appeal was called upon to examine the case as to the facts and the law. In particular, it had to make a full assessment of the question of the applicant's guilt or innocence [...] The only limitation on its jurisdiction was that it did not have the power to increase the sentence imposed by the City Court.

However, the above-mentioned question was the main issue for determination also before the Court of Appeal. In the circumstances of the present case that

⁴⁷ Cf. 40 D.R., pp. 258 ff.

⁴⁸ Cf. Eur. Court H.R., *Ekbatani Case*, Series A, Vol. 134 (1988).

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question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offence [...] - and by the complainant. Accordingly, the Court of Appeal's re-examination of Mr. Ekbatani's conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant.

The limitations on the Court of Appeal's powers as a result of the prohibition of *reformatio in pejus* related only to sentencing. They cannot be considered to be relevant to the principal issue before the Court of Appeal, namely the question of guilt or innocence. Neither can the fact that the case-file was available to the public.⁴⁹

Accordingly, the Court held that there had been a violation of Article 6(1) of the Convention.

As pointed out in the different dissenting opinions in the case, Swedish law gives a defendant a limited right of appeal which goes beyond what is required by Article 6 of the Convention; furthermore, not even Article 2 of Protocol No. 7 requires that an appeal to a higher tribunal should be available since in this instance the offence was "of a minor character". Thus, the limitation on the appeal procedure was that the appellate court would be able to decide the case without a hearing where it did not consider one to be necessary on the basis of the facts as established by the lower court and the court's application of the law. Moreover, in the case there was a prohibition of *reformatio in pejus* where the appeal had been lodged by the defendant.

As pointed out by judge *Thór Vilhjálmsson* in his dissenting opinion, "... it is not in the interest of justice to deny to appellate courts the possibility of dispensing with a full rehearing of a case concerning a minor offence, even when they are called upon to decide both questions of fact and of law."⁵⁰ Thus, there is a lot to be said in favour of the assertion that the Court had gone too far in its application of Article 6(1) in this case, when holding that the applicant was not given a fair trial.

Similarly, in Application No. 11464/85 the Commission admitted an application in which the applicant had been denied an oral hearing before the *Kammarrätt* in a case concerning the imposition of a so-called special charge (tax supplement) on the applicant. A friendly settlement was subsequently reached, so the Commission did not have to rule on the merits of the

⁴⁹ Ibid., at para. 32.

⁵⁰ Ibid., at p. 17.

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case.

In Application No. 11855/85 the Commission held that a sale of a real estate which was conducted publicly by *Kronofogdemyndigheten* [the Enforcement Office] "... was not a procedure by which a court determined "civil rights" and, consequently, Article 6 of the Convention did not apply to that sale".⁵¹ The Commission then observed "... that the Court of Appeal was the first and only judicial body which examined the merits of the applicants' complaint against the public auction."

It considered, therefore, "... that the applicant was entitled to a public hearing before that Court, since none of the grounds listed in the second sentence of Article 6 para. 1 could have justified an exception from the rule in the first sentence".⁵² This applied even though the applicants had not requested a hearing before the *Hovrätt*, since the applicable procedural rules would not have secured them a hearing if they had requested to have one, since "... the Court is not obliged to hold a hearing if the party requests it and there is nothing to suggest that, in the present case, such a request would have been granted had it been made."⁵³

A minority of the Commission found, on the other hand, that the "... failure to request a hearing should therefore be interpreted as tacit approval of the appeal being examined by the Court without a hearing."

In Application No. 10729/83 the applicant challenged the so-called "test case method" under Article 6(1) of the Convention. The applicant had brought a civil action against the manufacturer of a pharmaceutical product and the doctor who prescribed it. She alleged that the product had damaged her health. On the 10 April 1981 the Court in the applicant's case decided to adjourn the main hearing pending the outcome of these "test cases" before a different court. The applicant complained several times about this decision. Final judgment in the "test case" was given on 22 December 1982; the plaintiffs lost. Before the Commission, the applicant complained of the length of the proceedings.

The *Swedish* Government advanced several arguments in favour of this "test case method". The most convincing one was, however, that the Commission itself on several occasions had resorted to this method. In these

⁵¹ Cf. Report of the Commission, para 138.

⁵² *Ibid.*, at para. 139.

⁵³ *Ibid.*, at para. 148.

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circumstances it was difficult for the Commission not to agree with the Government. Accordingly, it held

"In principle, the Commission is thus prepared to accept the pilot case method adopted by the *Swedish* courts. A condition for finding this method acceptable in the circumstances of the present case is however that the pilot case could be said to have been a case of substantial significance for the outcome of the applicant's action before the District Court."⁵⁴

18.3.4. Other Questions relating to Article 6(1).

In Application No. 9707/82⁵⁵ the Commission essentially held that a three years time-limit from the birth of the child for instituting paternity proceedings did not disclose any appearance of a violation of Article 6(1) of the Convention.

A rather peculiar situation as to the interpretation of Article 6(1) was present in the *Eriksson Case*.⁵⁶ The question at issue was whether the applicant, whose child was placed in a foster home and subjected to a so-called "prohibition on removal", under *Swedish* law had any remedy before a court with regard to restrictions imposed on her access to the child. However, under the *Swedish* legislation it was indeed doubtful whether *Sociala Distriktsnämnden* was authorized to issue such restrictions. In a decision of 18 July 1988⁵⁷ the *Regeringsnämnden* held that a decision by the Social Council to restrict the access rights of parents while a prohibition on removal under section 28 of the Social Services Act was in force had no legal effect and that, consequently, no appeal to the administrative courts would lie against such a decision. Nor could any such right of appeal be inferred from general principles of administrative law or from the Convention itself.

The *Swedish* Government admitted that this was so, but submitted that the applicant could have a court review of the reasons underlying the restrictions by challenging the prohibition on removal or by requesting the return of her child under Chapter 21, section 7, of the Parental Code or - as submitted before the Commission - Chapter 6, section 8, of the Parental

⁵⁴ Cf. 44 D.R., pp. 199 ff., at p. 200.

⁵⁵ Cf. 31 D.R., pp. 223 ff.

⁵⁶ Cf. Eur. Court H.R., *Eriksson Case*, Series A, Vol. 156 (1989).

⁵⁷ Case No. 2377 of 18 July 1988.

Other Questions relating to Article 6(1)

Code.⁵⁸

Neither the Commission nor the Court were convinced by the Government's argumentation. Thus the Court stated:

"81. Like the Commission, the Court is unable to accept this argument. Especially in cases of the present kind, the question of access is quite distinct from the question of whether or not to uphold the prohibition on removal [...] only if sufficient access is first admitted will there be real possibilities of having the prohibition on removal lifted. The recourse available in the administrative courts in the form of a challenge to the prohibition on removal is thus not sufficient for the purpose of the mother's claim for access rights. An application under section 7 of Article 21 of the Parental Code must also be considered irrelevant for this purpose, as such an application will in principle succeed only in the same circumstances as a challenge to a prohibition on removal..."

The Government's argumentation seemed at a first glance to be quite convincing: the question of the restriction on the mother's access should be seen in its proper context. But, as rightly seen by both the Commission and Court, this argumentation was in fact circular, since "... only if sufficient access is first admitted will there be real possibilities of having the prohibition on removal lifted."

18.4. Article 5(4).

Article 5(4) of the Convention stipulates:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful."

This paragraph lays down the principle of judicial control of the legality of the deprivation of liberty.⁵⁹ It is quite clear that in cases in which a person has been deprived of his liberty this provision absorbs the Article 13 complaint, since "proceedings by which the lawfulness of his detention shall be decided speedily by a court" is a narrower concept than "an effective remedy before a national authority" (see *supra* section 18.1).

In Application No. 7376/76 the Commission ruled that a detention of approximately two hours as well as the time spent on an aircraft from Sweden

⁵⁸ See Eur. Court H.R., *Eriksson Case*, Series A, Vol. 156 (1989), para. 45.

⁵⁹ See Fawcett (1987), pp. 116 ff.; and Jacobs (1975), pp. 72 ff.

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to Japan did not, in spite of the absence of any local remedy by which the lawfulness of the applicant's detention could have been determined, amount to a violation of Article 5(4).⁶⁰

In the *Nielsen Case*⁶¹ both the Commission and the minority of the Court found that the applicant, a 12-year-old boy who had been hospitalized in a closed ward in a psychiatric hospital by the holder of parental rights, did not have any possibility of bringing the question of the lawfulness of his detention before a *Danish* court. The lawfulness of his detention had previously been challenged both before *Københavns Byret* and the *Østre Landsret* under the Mental Health Act, but both courts had concluded that the placement of the applicant in the child psychiatric ward was not covered by the right to judicial review set forth in this act, since he was not considered to be of unsound mind.⁶² The majority of the Court did not have to rule on this point since they concluded that the hospitalization of the applicant did not amount to a "deprivation of liberty" within the meaning of Article 5(4) of the Convention. Before the Court the *Danish* Government submitted that Article 63 of the *Danish* Constitution provided the applicant with a direct right to judicial review, so it would have been interesting to see the Court rule on this point.⁶³

However, in the above-mentioned *Case of E v. Norway*,⁶⁴ concerning the unwritten *Norwegian* constitutional principle of judicial review of administrative action in relation to Article 5(4) of the Convention, the Commission did in fact rule on this point.

Thus the Commission first held that the basis for the courts control is the unwritten constitutional principle of judicial review of administrative action.

⁶⁰ Cf. 7 D.R., p. 123 ff., at p. 125.

⁶¹ Cf. Eur. Court H.R., *Nielsen Case*, Series A, Vol. 144 (1988).

⁶² Ibid., Report of the Commission, para. 136, and the joint dissenting opinion of judges Thór Vilhjálmsson, Pettiti, Russo, Spielmann, de Mayer and Valticos, p. 28 f.

⁶³ More specifically, the Government submitted that "... regarding that provision the Government admits, however, that - aside from the general right of courts of justice pursuant to section 63 of the Constitution to verify the lawfulness of actions of public authorities - there does not exist any *special* right to bring questions of the lawfulness of commitment before a court. It is, however, provided in *Danish* law that the lawfulness of not only legal acts but factual actions of public authorities may be brought before courts of justice for review pursuant to section 63 of the Constitution. This applies also to questions regarding hospitalization", cf. Eur. Court H.R., *Nielsen Case*, Series A, Vol. 144 (1988), Memorial of the Danish Government (Cour (87) 134), p. 14.

⁶⁴ Cf. Eur Court H.R., *Case of E v. Norway*, Series A, Vol. 181 (1990).

Article 5(4)

In the opinion of the Commission the competence of the courts is, however, limited in relation to administrative discretion, such as the assessment of the most expedient choice of preventive measures. The courts were able, however, declare a decision invalid if it could be regarded as an abuse of power. As regards the possibility of judicial review of the Ministry's decision under section 39 of the Penal Code, the Commission concluded:

141. It has also been established that there exists no *Norwegian* case-law which shows that an administrative decision taken under section 39 of the Penal Code has been overruled by the courts. In fact only one case exists whereby a court has considered such decisions taken under section 39 para. 1 (e) outside mental hospitals. This is the judgment of the Oslo City Court [*Oslo Byrett*] of 27 September 1988 against which no appeal was lodged by the applicant. Furthermore not a single case exists whereby the courts have considered administrative decisions taken under section 39 para. 1 (f) of the Penal Code. Consequently the Commission finds that the state of the case-law is not yet such as to establish with adequate clarity whether the review meets, from the point of view of its scope, the requirements of Article 5 para. 4. This view is supported by the commission, established by the Ministry of Justice, which in 1983 raised the question whether the *Norwegian* provisions relating to security measures were in conformity with Article 5 para. 4 of the Convention."

Consequently, the Commission found that the scope of the control afforded by the remedy available was not wide enough to bear on the conditions essential for the applicant's detentions in the sense of Article 5(4) of the Convention.

Before the Court it was explained that under the unwritten *Norwegian* constitutional principle of judicial review of administrative action, the courts ensure that the administrative authorities have acted within the legal framework by which they are bound. They ascertain whether the impugned decision or regulation has been made by the competent authority and in accordance with procedural requirements, including those contained in the Public Administration Act. They always have an unlimited power to review facts on which the decision is based. Thus, where the mental capacity of the person concerned is relevant, psychiatric experts may assist the courts as expert witnesses. Nor are there any restrictions on the courts' competence to review the authorities' application of the relevant legal provisions [*"rettsanvendelsesskønn"*], even where these provisions seem to leave some discretion to the authorities, for instance by referring to such standards as "unreasonable", "unacceptable" or "good business practice". However, as regards purely discretionary administrative decisions, namely decisions or steps in a specific decision-making process which are left unregulated by the relevant law [*"fritt*

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skønn eller hensigtsmessighetsskønn", the courts will usually limit their examination to determining whether or not there has been a misuse of power or whether the decision is manifestly unreasonable.⁶⁵

Moreover, it has been established that applications for judicial review of administrative decisions are very frequent in *Norway*. They account for more than a third of all civil cases heard by the *Høyesterett* (and amount to more than 200 a year).⁶⁶

Finally, as was seen in chapter 16, the judgment contained an outline of the *Norwegian* case-law regarding the domestic application of the Convention.⁶⁷

In its reasoning, the Court first laid down that Article 5(4) does not provide a right to judicial review of such a scope as to empower the Court, on all aspects of the case to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1).

Regarding the availability of adequate review of the applicant's case the Court first observed that the applicant had the possibility of challenging in the ordinary courts each of the Ministry's decision that he should remain detained in custody under section 39(1)(e) or (f) of the Penal Code. Such proceedings could be instituted in accordance with Chapter 30 of the Code of Civil Procedure. This was confirmed by the fact that the applicant had been a party to such proceedings. The Court then elaborated on the possibility of such proceedings and finally concluded:

"50(4). The existence of a remedy under Article 5 § 4 of the Convention must be sufficiently certain to give the individual concerned adequate protection against arbitrary deprivation of liberty [...] However, under the *Norwegian* system the courts have the competence not only to determine whether the two main conditions for imposing security measures are still satisfied but also, in the light of a full examination of the facts, to determine whether the administrative authorities' decision to impose the impugned measure of detention was or was not arbitrary.

It is true that there have not so far been any decisions by the *Norwegian* Supreme Court to the effect that an administrative decision taken under Article 39 of the Penal Code can be overruled in judicial proceedings. Nevertheless, on the basis of the foregoing examination of the *Norwegian* system, the Court is satisfied that the available judicial review was wide enough to bear on those conditions which,

⁶⁵ *Ibid.*, at para. 41.

⁶⁶ *Ibid.*, at para. 45.

⁶⁷ *Ibid.*, at para 42.

Article 5(4)

under the Convention, were essential for the lawful detention of the applicant pursuant to Article 39 § 1 of the Penal Code."

Regarding the courts' power to order release of the applicant the Court ruled:

"62. If a *Norwegian* court considers that a disputed administrative decision cannot be upheld, the conclusion in the judgment will normally be only to declare the decision invalid [...] However, the Court is satisfied that there where an administrative decision to detain a person was considered to be invalid, the *Norwegian* court would - in accordance with the general principles of judicial review - have the power to order his release. An order for immediate release could be based on Article 148 of the Code of Civil Procedure, under which a court may, on petition, decide that a judgment can be enforced before it becomes final if "special circumstances so require"..."

However, in the end the Court held that the proceedings instituted before the City Court were not carried out speedily and, consequently, for this reason a violation of Article 5(4) had taken place.

Thus it can be concluded that proceedings instituted under the unwritten *Norwegian* constitutional principle of judicial review of administrative action, or under Article 63 of the *Danish* Constitution, in combination with the status of the Convention as a source of law in domestic law, in the Court's view, provide better guarantees than the so-called *habeas corpus* proceedings which the Court dealt with and found insufficient for the requirements of Article 5(4) in the *Case of X v. the United Kingdom*.⁶⁸ As pointed out in chapter 16, this decision is a recognition of the unwritten *Norwegian* constitutional principle of judicial review as efficient court proceedings, as well as a recognition of the status of the Convention as a source of law in domestic *Norwegian* law. Or to be more precise, it is probably the *combination* of these principles that led the Court to its conclusion.

⁶⁸ Cf. Eur. Court H.R., *Case of X v. the United Kingdom*, Series A, Vol. 46 (1981).

CHAPTER 19

Conclusions to Part V

As was seen in chapter 16, in some cases the *Danish* and the *Norwegian* Governments have, on the basis of Article 63 of the *Danish* Constitution and the unwritten *Norwegian* principle of judicial review of administrative action, argued that the Convention is a source of law in domestic law, whereas no such argument has been put forward by the *Swedish* Government. This is, of course, due to the fact that in domestic *Swedish* law no - written or unwritten - rule providing the courts with a general competence to review administrative decisions exists.

In the *Case of Kjeldsen, Busk Madsen and Pedersen* the *Danish* Government argued for the first time that *Danish* administrative authorities have to take the Convention into account when exercising their discretionary powers. Such decisions are, the Government explained, subject to judicial review by virtue of Article 63 of the Constitution. The Commission accepted this argument as regards judicial review of administrative decisions, whereas it did not consider it effective in relation to legislation. As pointed out in section 17.2.1, this seems to some extent to be due to a misunderstanding, since *Danish* constitutional law recognizes judicial review of legislation by virtue of a constitutional custom. The Commission has subsequently confirmed that instituting proceedings under Article 63 of the *Danish* Constitution is a domestic remedy which is effective, unless the applicant faces imminent deportation from *Denmark*, and which needs to be exhausted because the *Danish* administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the Convention.

The next step was probably taken in the *Hauschildt Case* where the Court indicated that it would be willing to accept that the Convention has - not only in relation to the exercise of discretionary powers but also in general - the position of a source of law in domestic *Danish* law, provided that the state of case-law and legal doctrine suggest in a convincing way that the Convention holds such a position. In the case at issue, the Court did not find that the *Danish* Government had submitted sufficiently ascertainable facts with regard to the domestic position of the Convention as a source of law.

In the *Case of E v. Norway* the Court, in contrast to the Commission, accepted that the combination of the unwritten *Norwegian* principle of

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judicial review of administrative action and the position of the Convention as a source of law fulfilled the requirements set forth in Article 5(4) concerning judicial review of the deprivation of liberty. This is, if not in explicit terms, in effect a recognition on the part of the Court of the domestic position of the Convention as a source of law in domestic *Norwegian* law.

The fact that the *Norwegian* Government was able to refer to a more constant domestic case-law than the *Danish* Government was in the *Hauschildt Case* seems to have been the decisive point for the Court. Since a similar case-law has evolved in *Denmark* over the last couple of years, it is likely that the Court would also recognize that the Convention holds a similar position in *Danish* law. Moreover, it is likely that the Court may also recognize that the combination of a general principle of judicial review of administrative action combined with the Convention as a domestic source of law are sufficient for the purposes of Article 6(1) and as an effective remedy, undoubtedly, before a national authority within the meaning of Article 13.

Whether this also is the case concerning *Swedish* law is more doubtful. Although there has been a sharp change in the attitude of the *Swedish* courts vis-à-vis the Convention over the last years in a positive direction, the large amount of cases directed against *Sweden*, as well as the violations of the Convention which the Commission and Court has found, probably exclude *Sweden* from arguing that the Convention has a strong position in domestic law. Furthermore, some quite strong (*obiter dicta*) statements from the *Swedish* courts state that the Convention does not hold any domestic position in *Sweden* (see *supra* section 6.2).

One thing is, however, certain. As in other cases where the Commission and Court have indicated that it was willing to accept the argumentation put forward by the *Scandinavian* Governments in future cases, the governments will from now onwards plead extremely strongly on the position of the Convention as a source of law in domestic law. The *Case of E v. Norway*, viewed in the light of the *Hauschildt Case*, provides the basis for such an argumentation.

Apart from the above-mentioned cases it is difficult, due to the diversity of the questions which have been at issue before the Commission and Court involving the *Scandinavian* countries, to characterize in brief terms the way in which the *Scandinavian* Governments plead their cases in Strasbourg in relation to the domestic position of the Convention. The fact that in many cases the question of the domestic status of the Convention has not been an

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issue at all does not make the task easier. However, a few simple observations can be made.

Like any other government or party to a case, the *Scandinavian* Governments tend to describe the status of domestic law - including the domestic position of the Convention - in somewhat more positive terms than probably matches practice. As pointed out in chapter 15 and confirmed by this examination, the possibilities of doing so are, however, rather limited, due to the fact that the Government has to answer to the domestic (legal) community. Nevertheless, it is possible to find examples of a dissolute argumentation in some cases (see, for example, *Sporrong and Lönnroth Case* (see *supra* section 18.2.3) and *Eriksson Case* (see *supra* section 18.3.4). If one excludes these relatively rare examples, the *Scandinavian* Governments seem to plead their cases properly and endeavour to stick to the disputed points. This applies in particular to some recent cases directed against *Sweden*.

As regards the domestic position of the Convention there seems to be a difference between the way in which the *Swedish* Government, on the one hand, and the *Danish* and *Norwegian* Governments, on the other, present the issue before the Commission and Court. Where the *Swedish* Government tends to stress the fact that its incorporation into domestic law is not required under the Convention itself, the *Danish* and *Norwegian* Governments emphasize the fact that the Convention is a source of law in domestic law. This difference in argumentation technique may reflect an underlying difference in the governments' view on the domestic status of the Convention.

As regards the more practical application of Articles 26 and 13 (and 6(1) and 5(4)), it does probably not make much sense to try to summarize the discussion in chapters 17 and 18. These chapters give a survey of the remedies which are effective within the meaning of Article 13, and the ones which need to be exhausted within the meaning of Article 26. However, the Governments' argumentation in these cases is, although not as illustrative as the above-discussed cases, also interesting within the present context. Of particular interest in this context is the way in which the *Danish* Government argued that a petition for the re-opening of a criminal case should not be exhausted before an application is filed with the Commission.

Finally, it is probably worth mentioning that the exposition in chapters 17 and 18 are illustrative of the particular fields of domestic *Scandinavian* law

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in which there are problems in relation to the procedural guarantees deriving from the Convention. The most important examples here are:

(1) The lack of judicial review of certain administrative decisions in *Sweden* is probably the best example of a whole branch of (*Scandinavian*) law which, generally speaking, was irreconcilable with the Article 6(1) of the Convention. Within this branch of law the *Swedish* system was, and still is, different from both the *Danish* and the *Norwegian* ones. It should be mentioned here, that *Sweden* has now passed legislation in order to fulfill the requirements of the Convention in this respect (see *supra* section 4.3.2.C).

(2) The composition of judicial of quasi-judicial bodies with the participation of interest organizations, common in all *Scandinavian* countries, in relation to Article 6(1).

(3) The guarantees provided in domestic law in relation to the removal, with or without the consent of the holders of parental rights, of children from their homes.

(4) The lack of a public hearing in appeal proceedings.

(5) The disqualification of judges, who have ordered detention on remand or taken other pretrial decisions, from subsequently hearing the case as trial judge. In the long run this question may have consequences for the whole system of criminal procedure in *Scandinavia*, due to the large number of single judge courts in *Scandinavia*.

(6) The possibility of judicial review of a number of administrative decisions.

Apart from these branches of law, the cases directed against the *Scandinavian* countries have concerned a number of very different questions.

PART VI

Recapitulation and Conclusion

CHAPTER 20

General Recapitulation and Conclusion

The basic aim of this study has been to examine *the impact of the European Convention on Human Rights on domestic Scandinavian Law*. It will be recalled that the study has approached this question from the following five angles:

- (1) The theoretical point of departure as to the rules governing the relationship between international law and domestic *Scandinavian* law.
- (2) The impact of the Convention on the legislative process in *Scandinavia*.
- (3) The application of the Convention in domestic *Scandinavian* law.
- (4) The application of the Convention in domestic *Scandinavian* law in a comparative perspective: a survey of *Spanish, Italian and English* law regarding the domestic position of the Convention.
- (5) The official *Scandinavian* view on the domestic status of the Convention as it has been put forward by the respective governments in proceedings before the European Commission and Court of Human Rights.

The Convention has not been incorporated into domestic law in *Denmark, Norway or Sweden*, since no such general incorporation was considered necessary. It is surprising how little debate there was in the *Scandinavian* Parliaments when they had to approve the ratification of the Convention. It seems beyond all doubt that the Parliaments considered that the national jurisdictions *more than* fulfilled the requirements of the Convention. It may be said that this was a "laissez-faire" way of "incorporating" it into domestic law. However, it has frequently been the case that domestic legislation has been amended in order to fulfil the obligations under the Convention; such amendments to existing legislation may be considered as *partial* incorporations of the Convention. Moreover, it should be noted that principles and rules similar to the provisions of the Convention were to a large extent already in force by virtue of the national Constitutions, of express statutory provisions and of general principles of law. As regards provisions of the Convention where this was not considered to be the case, special legislation was passed or a reservation was made.

This does not mean, of course, that the Convention did not make a legal impact on the *Scandinavian* countries. It served, and still serves, as a basis,

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binding upon each country under international law, for a corresponding set of domestic rules of law. Thus the responsibility for the day-to-day fulfilment of the Convention lies primarily with the Legislature, although the law-enforcing authorities also have a major responsibility in this respect.

The exposition in *Part II* suggests that the task of securing that *domestic legislation conforms* to the Convention is a manageable one. Although from time to time it may be difficult to predict the innovations of the European Court, it still seems possible to ensure that domestic law is compatible with the Convention without with few problems.

The political will to make sure that domestic law is compatible with the requirements of the Convention seems to be very strong in *Denmark*; usually all (responsible) political parties agree on amendments aimed at bringing domestic law into line with the Convention. The same must be assumed to be the case in *Norway*, but the lack of explicitly discussed cases in the *Storting* does not allow clear conclusions to be drawn. However, some of the *Danish* examples discussed show that the quality of the amendments passed has been affected by the eagerness to bring domestic law into line with the Convention as quickly as possible. In *Sweden* there seems to have been somewhat more debate on whether or not, and to what extent, decisions of the European Commission and Court should be implemented in domestic law. This has basically applied to the question of the lack of judicial review of all kinds administrative decisions.

Apart from the impact of decisions of the Commission and Court to which the State has been a party, the Convention itself plays *a certain role* in the preparation of legislation. It is possible to find examples where the Convention or decisions directed against other states have been the principle reason for amending domestic legislation. Moreover, it is also interesting to observe that it is to a very large extent within the same fields of law that the *Scandinavian* expert committees have discussed the Convention: aliens legislation, coercive measures in psychiatric treatment, the *principle of legality* within criminal law etc. The scope of these considerations varies considerably, however, from committee to committee.

As regards *the application of the Convention by domestic law-enforcing authorities*, it is submitted that the ECHR - although it has not been formally incorporated into domestic law - *de lege lata* is a source of law in domestic *Scandinavian* law, and that this *de lege ferenda* and *de sententia ferenda* is desirable. Thus it has been argued that legal practice, taken as a whole but

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with certain exceptions, has gone so far in its application of the Convention that this application can only be explained by the fact that the Convention holds the position of a source of law in domestic law. Accordingly, the study as such has taken a source of law perspective on the application of the Convention in domestic *Scandinavian* law. Furthermore, the study has sought to elaborate more generally on this source of law perspective.

This approach is to some extent contrary to the traditional view which may be characterized by the catch-word "*dualism*" and may briefly be explained in the following way: When and if a conflict between a treaty and an *express* provision of a domestic statutory rule arises, the courts should apply the domestic rule and not the treaty provision. This is known as the *principle of the supremacy of domestic law*. Any treaty provision which is to have domestic effects must be incorporated into domestic law by a domestic legal act. This is known as the *principle of transformation*. However, domestic *Scandinavian* law is generally presumed to be in conformity with undertaken international obligations. This is known as the *principle of presumption*.

Sources of law is understood here as factors on which the judge not only shall or may rely when deciding a case, as is usual in *Scandinavian* jurisprudence, but factors which actually carry some weight in this respect.

The source of law perspective and the more traditional general principles seem at first to be at loggerheads. This may, however, not be the case. While the traditional view focuses on the clear-cut conflicts between international law and domestic law and emphasizes that, in such cases, the constitutional principles must predominate, the writers in favour of the sources of law approach underline that more attention should be paid to the more frequent cases in which only minor - and presumably unintentional - divergences between international law and domestic law appear. Moreover, they emphasize that it is not possible to resolve such conflicts by simple means. A conflict between international law and domestic law does not differ in kind from conflicts between two domestic rules and, consequently, it must be resolved by similar means. In other words, where the traditional view is *normative* in its approach, the sources of law perspective is *descriptive*, *i.e.* it attempts to describing the law-enforcing authorities' application of international law.

As regards the Convention it is unlikely that clear-cut conflicts between the Convention and domestic law will emerge, since rights similar to those in the Convention are to a large extent embodied in the national Constitu-

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tions. In this particular area the practical problem confronting domestic authorities is to find means of preventing accidental infringements of the developing European standards of human rights from the dynamic element of commitments undertaken.

On the basis of this sources of law perspective the study examines in *Part III the application of the Convention in domestic Scandinavian law by the courts and other law-enforcing authorities*. This part constitutes the core of the study. The results of this examination may be summarized as follows:

When a treaty (this also includes a *partial* incorporation of the Convention) is incorporated into domestic law by being reformulated in a statute, the treaty itself is an important factor in the interpretation of the statute, unless it is *clearly indicated* that the Legislature has deliberately intended not to incorporate the treaty completely. It is especially in this context that the *principle of presumption* is applicable. The *travaux préparatoires* of statutes, generally speaking, have a very strong impact on the interpretation of statutes in the *Scandinavian* countries. This also applies to treaties which are incorporated into domestic law by an administrative act; they should be regarded as an important part of the *travaux préparatoires*, not only of the regulation itself, but also of the statute which empowers the administration to issue the regulation.

However, this applies not only to treaties. In *Scandinavian* law the *travaux préparatoires* of a statute carry considerable weight, especially if the wording of the provisions is unclear and ambiguous. From the cases discussed in this context, it is difficult to conclude whether or not the treaties which have been incorporated into domestic law by a specific act have played a more prominent part in the interpretation of domestic law than *travaux préparatoires* have in relation to the application of "pure" domestic law.

Of particular interest is the fact that no reported *Danish* or *Norwegian* case-law exist in which it is established that in the case at issue there is a conflict between the ECHR and domestic law. Consequently, *Danish* and *Norwegian* courts have avoided taking a stand on how a conflict between the Convention and domestic law would be resolved. On the contrary, *Danish* courts have, in effect, though without phrasing it in terms of a conflict, on at least two occasions let the Convention prevail over domestic *Danish* law.

As regards the three *Swedish* cases which have normally been viewed as a judicial affirmation of the *transformation theory*, it is submitted that only one of them can be viewed as a clear precedent for the *transformation theory*.

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Consequently, in *Scandinavian* law there exists only *one* case in which the courts, in the case of a conflict between the Convention and domestic law, have allowed domestic law to prevail over the Convention. This is quite remarkable and certainly cannot be regarded a proper judicial affirmation of the traditional "dualist" approach to the question of the relationship between international law and domestic law, embodied in the *principle of the supremacy of domestic law* which has been set forth in legal writings.

On the contrary, in a number of cases it is held that *there is no conflict between domestic law and the Convention* as interpreted by the Court. Reaching such a conclusion presupposes that the Court has interpreted the Convention independently and then compared this interpretation with domestic law. Under a "dualist" system, strictly speaking, such a laying down that in the case at issue there is no conflict between the Convention and domestic law would seem unnecessary. However, there can be no doubt that the courts prefer to pass judgments from where appears that they have actually considered the relationship with the Convention. From an analytical point of view this establishment of conformity of domestic law with the Convention can undoubtedly be regarded as a direct application of the Convention, because the Convention in such cases has formed an integral part of the Court's reasoning. In other words, the Convention has been applied as a *source of law*. However, this does not exclude that the courts from time to time base their decisions on an interpretation of the Convention which subsequently proves to have been erroneous and is overruled by the European Commission or Court.

If there is an internal source of law which *can be interpreted in several equally acceptable ways* this is in principle a situation where the question of whether or not there is a conflict between international and domestic law can be raised. Here it is established in legal writings and confirmed in judicial practice that the person or authority applying the law shall choose the interpretation which corresponds with the international source of law.

Moreover, it follows from the case-law discussed that international law and the ECHR certainly play a more prominent role in judicial practice than presupposed in the *principle of presumption*. Thus there exists a *positive interaction between international law and domestic law* which, *inter alia*, manifests itself in the fact that the courts, in particular *Norwegian* courts, have on a number of occasions applied international law in cases in which there was no risk that domestic law would be contrary to international law.

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It should in particular be pointed out that in these cases the courts have applied domestic law in accordance with often quite unclear rules of international law. This is probably most appropriately regarded as an attempt to *enforce* international law by applying it at the domestic level or as an attempt to *harmonize* international law and domestic law. This is in itself an interesting aspect of the issue since it shows that the *principle of presumption* is not qualified to explain the process of the application of international law in domestic law and provide clear guidelines for the resolution of such conflicts. This is probably due to the fact that the principle has two different functions; it serves both as legitimation for the application of international law in the domestic legal order and as a principle of interpretation for conflicts between international law and domestic law.

Furthermore, it may be concluded that, in cases in which the Legislature has incorporated a treaty passively and this subsequently proves to be an insufficient fulfilment of the treaty, the courts will grant the administration a margin of appreciation in the sense that in their application of domestic law the courts will follow the interpretation on the basis of which it was considered unnecessary to incorporate the treaty.

Scandinavian courts have on a number of occasions gone further and *applied directly* international law in general and the Convention in particular. The intensity of this application of international law varies from ascertaining that a specific interpretation of domestic law is not contrary to the Convention, to regarding international law as sufficient authority for pronouncing the death penalty. However, the very fact that the courts embark upon a discussion of the relationship between domestic law and international law shows that international law is regarded a *source of law* in domestic law. That the courts on some occasions, in the case of a conflict between the Convention and domestic law have, in effect, made the Convention prevail over domestic law is not only further proof that the courts regard the Convention as a source of law in domestic law, but also that the position of the Convention in the domestic norm-hierarchy is significant.

Recently, in some cases the courts have made *ex officio* references to the Convention when dealing with a question of domestic law. This probably demonstrates more strongly than anything else that the courts consider the Convention a source of law in domestic law. Similarly, the courts have recently become extremely aware of the European Court's judgments involving the country at issue. Thus the courts have discussed and interpreted

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Strasbourg case-law more explicitly than they have ever done with domestic precedents. Therefore, there can be no doubt that the courts feel very bound by these judgments, and both the *Danish Højesteret* and the *Swedish Högsta Domstolen* have been willing to revise their own case-law as a consequence of the judgments from the European Court.

Danish and *Norwegian* administrative authorities are under a legal obligation to include the Convention, whenever relevant to the case at issue, in the exercise of their discretionary powers. This obligation is subject to judicial review under Article 63 of the *Danish* Constitution and the unwritten *Norwegian* principle of judicial review of administrative action. In comparison with *Denmark* and *Norway* the legal position in *Sweden* in this respect is less clear. However, the current tendency seems to be, as in the other *Swedish* cases concerning the Convention, to pay more attention to the Convention than was previously the case. On the other hand, it is not possible to say in clear terms that under *Swedish* law administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the Convention; a recent decision from one of *Riksdagens Ombudsmän* suggests that no such obligation exists.

To sum up, one common feature is manifest: *the courts do not recognize conflicts between international law, as they interpret this, and domestic law*. Consequently, with a few exceptions, the courts have managed to avoid taking a stand on how a (clear-cut) conflict between international law, including the Convention, and domestic law should be resolved. These exceptions have, however, to a very large extent been *obiter dicta* statements; it appears that the courts have in only three instances expressly let domestic law prevail over the treaty provision as part of the *ratio decidendi* of the judgment. As regards the Convention *only one* such case exists. In spite of this, the courts have on a number of occasions in substance and, in the most recent cases also in form, or explicit terms, applied the Convention directly. Where there was previously a tendency to ascertain only that the domestic solution found did not violate the Convention (international law), there is now a tendency to embark on discussions on the application of the Convention and Strasbourg case-law. There can be no doubt that the Convention is an international instrument, with considerable and substantial force at the domestic level also. Even so, the number of reported cases in which the Convention has been referred to is in absolute terms low, although in comparison with other international instruments it is by far the most applied treaty in

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domestic law.

With certain exceptions there is, generally speaking, a firm practice of paying more and more attention to the Convention in domestic legal decisions from the highest instances. Thus the cases in which most significance has been ascribed to the Convention are from 1988 onwards.

The *Norwegian* courts appeared, until recently, to have been more willing to apply the Convention than their *Danish* and *Swedish* counterparts, but the *Danish* and *Swedish* courts now tend to show a more or less similar willingness to apply the Convention. This applies in particular to the *Danish* courts which at the moment seem to be very determined to give the Convention a stronger position in domestic law.

Apart from the above observations, the available case-law can hardly be said to be a basis for drawing clear and unambiguous conclusions on the application of international law in general and the ECHR in particular in domestic *Scandinavian* law. However, it is certainly possible to point to some trends in legal practice:

(1) In deciding a case the courts apply international law as *law* and *not as facts*.

(2) There is apparently no difference in the courts' application of customary international law and treaties.

(3) The distinction between the *rule of interpretation* and the *rule of presumption*, in an analytical sense, does not reflect practice. This applies to both the criterion for making the distinction between the rules and the assumption that the *rule of presumption* cannot be applied to treaties which are more recent than the statute in question. Nevertheless, from a more practical point of view it may be useful to use this distinction because, in spite of all, it highlights whether the vague *principle of presumption* is applied as a principle of interpretation or as the legitimation for deviating from the wording of a domestic legal rule.

(4) In some cases the courts have applied international law to a greater extent than international law has itself required. This has been designated as *enforcing international law in domestic law*. The question of international law as a *source of law* in domestic law is very interesting since an application of this type goes considerably farther than what is presupposed in the *principle of presumption*.

(5) In *Denmark* and *Norway* it is clearly established that administrative authorities are under a legal obligation to exercise their discretionary powers

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in accordance with undertaken international obligations - be they incorporated or not - whereas in contemporary *Swedish* law there seems to be only a tendency to recognize such obligations.

Against this background it has been concluded that the *European Convention on Human Rights* is a source of law in domestic *Scandinavian* law. However, this source of law appears at the moment to carry slightly more force in *Denmark* and *Norway* than in *Sweden*.

One could, however, have wished that considerations regarding the relationship between international law and domestic law, which in individual cases undoubtedly support the assumption that domestic law should conform to international law, had been expressed more clearly in the judgments. This (previous) lack of explicit discussion of the position of the ECHR in domestic law seems to have caused some doubt as to the domestic fulfilment of the obligations under the Convention. However, in the most recent case-law the courts seem to have changed their attitude and in fact discussed and applied the Convention.

Finally, it should be mentioned that the terminology in this particular field of law *de lege feranda* in itself has some impact on the application of the Convention and other treaties.

Since in nearly all the available *Scandinavian* judgments no conflict between international law and domestic law was assumed, it is not possible, in general terms, to draw unambiguous conclusions *as to the weight of the international sources of law*. However, a few indications of how the courts may be expected to resolve such conflicts have emerged from the individual cases. But these indications do not provide any basis for general guidelines for the resolution of conflicts between international law and domestic law.

The writers who have asserted that international law is a source of law in domestic *Danish* law have assumed that, with regard to its position within the domestic norm-hierarchy, it should only yield to a domestic statutory provision if regard for it means that the Legislature's intentions are not being carried out. However, this view leaves ample room for the interpretation of the Legislature's intentions and says in fact only a little about how such conflicts should be solved.

In this study it has been submitted that in principle it is probably possible to go one step further and recognize that nothing unambiguous can be concluded from Article 19 of the *Danish* Constitution, from Article 26 of the *Norwegian* Constitution and from the Chapter 10, section 2, of the *Swedish*

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Instrument of Government on whether international law can be applied directly. The only *fundamental* restriction on the law-enforcing authorities' application of international law is the *principle of legality*: international law *cannot* substitute the requirement of statutory authorization laid down in this principle. The impact of the *principle of legality* is, however, not overwhelming in relation to human rights conventions. This view has reasonable support in the available case-law.

Apart from the restrictions following from the *principle of legality*, the view put forward does not mean that *international law*, in the case of conflict with domestic law, *should prevail absolutely*. Such a conflict must be resolved on the basis of an overall evaluation of the facts of the case - including the different sources of law. As in other cases of conflict between, on the one hand, a statutory rule and, on the other, another source of the law, it is certain that the statutory rule will carry considerable weight. But the considerations pointing in the opposite direction may carry such weight that a total evaluation makes the international law rule prevail.

Thus, *the lex specialis* and *the lex posterior derogat legi priori* principles will give some guidance in resolving a conflict between international law and domestic law, whereas *the lex superior principle* will normally be applied in such a way that it is assumed that international law, by definition, is holding a lower position in the norm-hierarchy than legislation.

Moreover, it is possible to point out some considerations which seem to have had specific significance in the resolving of conflicts between international law and domestic law. These considerations have been expressed, more or less explicitly, in the available case-law, but are also based on more common considerations:

(1) Is the conflict of a *total* or of a *partial* nature? The more limited the conflict is, the easier it is to base the application of the rule of international law on the *lex specialis principle*.

(2) The *political and legal* problems which might be involved in a breach of international law.

(3) *The strength and the clarity of the international rule*, including the degree of acceptance of the rule by the international community. There can be no doubt that the ECHR and other human rights conventions are treaties with a considerable impact on domestic law; this follows very clearly from the available case-law. The Convention is undoubtedly a forceful expression of a legal policy to which the *Scandinavian* countries profess to adhere.

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Case-law from the European Court to which the country at issue has been a party has a particularly strong impact on domestic courts. Thus the *Højesteret* has been willing, in effect, to disregard a clear domestic provision in order to follow the interpretation of the Convention laid down by the European Court. Similarly, the *Högsta Domstolen* has in such a case paid considerable attention to the Convention, although there has been no question of disregarding the domestic provision.

(4) *The strength and the clarity of the domestic rule.* It should, however, be recalled that the Swedish courts have emphasized as *obiter dicta* that incorporation is required if international law is to be applicable directly in domestic Swedish law. This may be interpreted as meaning that in Sweden domestic law is apparently *per se* regarded as having more strength than international law. But again, the question seems to be more complex; thus in some recent cases *Högsta Domstolen* has laid down that the Convention is an important means of interpretation regarding the Instrument of Government.

(5) The domestic rules' position within the *domestic norm-hierarchy*. As indicated previously, generally speaking, it is probably still fair to conclude that the Convention is regarded as being placed beneath legislation in the domestic norm-hierarchy. But in contemporary case-law there seems to be a tendency to allocate the Convention the same position in domestic law as legislation. However, one should probably be careful of not thinking too much in terms of a domestic norm-hierarchy when discussing the relationship between international law and domestic law.

(6) Is it possible to *ascertain the Legislature's intentions*? To the extent that these intentions can be ascertained, they will be ascribed considerable significance. This applies both when it is clear that the Legislature intended to fulfil an international obligation completely, or when it is *clearly indicated* that the Legislature did not want to implement a treaty obligation completely.

The large number of cases in which it has been established that there was no conflict between domestic law and the Convention in particular indicates, however, that it may be questioned whether the very concept of a *conflict of rules* reflects the process which leads the courts to the conclusion that, in the case at issue, there is no conflict between the domestic provision and the rule of international law. It appears quite clearly from the case-law discussed in this context that the interpretation of the domestic rule and the interpretation of the international rule influence each other mutually. This means that the

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domestic and the international sources of law are harmonized into one process and in the majority of cases, as a result of this harmonization, international law is not found to be in conflict with domestic law. Accordingly, the considerations listed above probably establish that no conflict exists between domestic and international sources of law, rather than acting as a guideline for the resolving of such conflicts.

Part IV of the study examines the position of the Convention in a "dualist" system (*the United Kingdom*), in a "dualist" system into which it has been incorporated (*Italy*) and in a "monist" system (*Spain*). These surveys do not serve any independent purpose, but have been used to view the application of the Convention in domestic *Scandinavian* law in a comparative perspective. The conclusions set forth above concerning *Scandinavian* law are indeed confirmed and to some extent amplified by this comparative analysis. On the basis of this analysis at least three points deserve to be mentioned:

First, it may be questioned in general whether the formal position of the Convention in the domestic norm-hierarchy says much in itself about the impact of the Convention on the application of domestic law. The problems of the application of the Convention seem to lie elsewhere: notably, when do the courts establish that there is a conflict between the Convention and domestic law?

Second, as regards the style of reasoning, there are some important differences between the national courts. Thus the *Scandinavian* Supreme Courts have interpreted domestic law in accordance with the Convention without establishing a clear conflict between the Convention and domestic law, even in cases in which it was quite clear that there was such a conflict. As soon as the decision at issue touches upon the competence of the Legislature the courts use somewhat guarded terms in their decisions. Similarly, the *Italian* courts have avoided disregarding the Convention when it conflicts with subsequently enacted legislation. The Spanish *Tribunal Constitucional* has, on the other hand, on a number of occasions directly overruled domestic provisions when it was not possible to reach an interpretation compatible with the Convention.

Third, in spite of this difference in styles of reasoning and in the legal provisions governing the relationship between international treaties and domestic law, it is surprising how similar, in effect, the application of the Convention in *Scandinavia* and *Italy* and *Spain* is. This study has indeed confirmed that the possibility of using the Convention's provisions as pur-

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suasive sources of law, where otherwise there appears to exist a lacuna in domestic law, or where the courts are faced with a doubtful or uncertain point of internal law, has *self-evident advantages*.

Accordingly, it is concluded that from *a strictly legal point of view* it would not have any significant consequences on the practical level if the Convention were incorporated into domestic *Scandinavian* law. Under the existing "dualist" system it is already possible to a very large extent for the courts to ascertain whether the Convention has been violated in concrete cases.

Finally, *Part V* examined (1) how the *Scandinavian* Governments argue the domestic position of the Convention before the Commission and Court, and (2) whether or not there is conformity between the way in which domestic courts apply the Convention and the way in which the Commission and Court view the domestic status of the Convention. In other words, do the European Commission and Court agree that the Convention is, or may be regarded as, a source of law in domestic *Scandinavian* law?

In some cases the *Danish* and the *Norwegian* Governments have, on the basis of Article 63 of the *Danish* Constitution and the unwritten *Norwegian* principle of judicial review of administrative action, argued that the Convention is a source of law in domestic law, whereas no such argument has been put forward by the *Swedish* Government. This is, of course, due to the fact that in domestic *Swedish* law no - written or unwritten - rule exists providing the courts with a general competence to review administrative decisions.

In the *Case of Kjeldsen, Busk Madsen and Pedersen* the *Danish* Government argued for the first time that *Danish* administrative authorities have to take the Convention into account when exercising their discretionary powers. Such decisions are, the Government explained, subject to judicial review by virtue of Article 63 of the Constitution. The Commission accepted this argument as regards judicial review of administrative decisions, whereas it did not consider it effective in relation to legislation. This seems to some extent to be due to a misunderstanding, since *Danish* constitutional law recognizes judicial review of legislation by virtue of a constitutional custom. The Commission has subsequently confirmed that instituting proceedings under Article 63 of the *Danish* Constitution is a domestic remedy which is effective, unless the applicant faces imminent deportation from *Denmark*, and which needs to be exhausted because the *Danish* administrative authorities

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are under a legal obligation to exercise their discretionary powers in accordance with the Convention.

The next step was probably taken in the *Hauschildt Case* where the Court indicated that it would be willing to accept that the Convention has - not only in relation to the exercise of discretionary powers but also in general - the position of a source of law in domestic *Danish* law, provided that the state of case-law and legal doctrine suggest in a convincing way that the Convention holds such a position. In the case at issue, the Court did not find that the *Danish* Government had submitted sufficiently ascertainable facts with regard to the domestic position of the Convention as a source of law.

In the *Case of E v. Norway* the Court, in contrast to the Commission, accepted that the combination of the unwritten *Norwegian* principle of judicial review of administrative action and the position of the Convention as a source of law fulfilled the requirements set forth in Article 5(4) concerning judicial review of the deprivation of liberty. This is, if not in explicit terms, in effect a recognition on the part of the Court of the domestic position of the Convention as a source of law in domestic *Norwegian* law.

The fact that the *Norwegian* Government was able to refer to a more constant domestic case-law than the *Danish* Government was in the *Hauschildt Case* seems to have been the decisive point for the Court. Since a similar case-law has evolved in *Denmark* over the last couple of years, it is likely that the Court would also recognize that the Convention holds a similar position in *Danish* law. Moreover, it is likely that the Court would also recognize that the combination of a general principle of judicial review of administrative action combined with the Convention as a domestic source of law are sufficient for the purposes of Article 6(1) and as an effective remedy, undoubtedly, before a national authority within the meaning of Article 13.

Whether this is also the case concerning *Swedish* law is more doubtful. Although there has been a sharp positive change in the attitude of the *Swedish* courts *vis-à-vis* the Convention over the last years, the large amount of cases directed against *Sweden*, as well as the violations of the Convention which the Commission and Court have found, probably exclude *Sweden* from arguing that the Convention has a strong position in domestic law. Furthermore, some quite strong (*obiter dicta*) statements from the *Swedish* courts state that the Convention does not hold any domestic position in *Sweden*.

One thing is, however, certain. As in other cases where the Commission and Court have indicated that it was willing to accept the argumentation put

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forward by the *Scandinavian* Governments in future cases, the governments will from now on plead extremely strongly on the position of the Convention as a source of law in domestic law. The *Case of E v. Norway*, viewed in the light of the *Hauschildt Case*, provides the basis for such an argumentation.

Apart from the above-mentioned cases it is difficult, due to the diversity of the questions which have been at issue before the Commission and Court involving the *Scandinavian* countries, to characterize in brief terms the way in which the *Scandinavian* Governments plead their cases in Strasbourg in relation to the domestic position of the Convention. The fact that in many cases the question of the domestic status of the Convention has not been an issue at all does not make the task easier. However, a few simple observations can be made.

Like any other government or party to a case, the *Scandinavian* Governments tend to describe the status of domestic law - including the domestic position of the Convention - in somewhat more positive terms than probably matches practice. As pointed out previously and confirmed by this examination, the possibilities of doing so are, however, rather limited, due to the fact that the Government has to answer to the domestic (legal) community. Nevertheless, it is possible to find examples of an unconvincing argumentation in some cases. If one excludes these relatively rare examples, the *Scandinavian* Governments seem to plead their cases properly and endeavour to stick to the disputed points. This applies in particular to some recent cases directed against *Sweden*.

As regards the domestic position of the Convention there seems to be a difference between the way in which the *Swedish* Government, on the one hand, and the *Danish* and *Norwegian* Governments, on the other, present the issue before the Commission and Court. Where the *Swedish* Government tends to stress the fact that its incorporation into domestic law is not required under the Convention itself, the *Danish* and *Norwegian* Governments emphasize the fact that the Convention is a source of law in domestic law. This difference in argumentation technique may reflect an underlying difference in the governments' view on the domestic status of the Convention.

As regards the more practical application of Articles 26 and 13 (and 6(1) and 5(4)), it probably does not make much sense to try to summarize this discussion. These chapters give a survey of the remedies which are effective within the meaning of Article 13, and the ones which need to be exhausted

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within the meaning of Article 26. However, the Governments' argumentation in these cases is, although not as illustrative as the above-discussed cases, also interesting within the present context. Of particular interest in this context is the way in which the *Danish* Government argued that a petition for the re-opening of a criminal case should not be exhausted before an application is filed with the Commission.

